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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 514

COUNTY OF LOS ANGELES, A BODY POLITIC AND CORPORATE,

Appellant,

vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY, A CORPORATION

Appellee

STATEMENT AS TO JURISDICTION

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above-entitled cause on appeal, respectfully represents:

A

Statutory Provisions Sustaining Jurisdiction

1. *Statutory Provisions*

The statutory provisions believed to sustain the jurisdiction of the Supreme Court of the United States is

Judicial Code, Section 1257 (28 U. S. Code, page 1565, section 1257; Act June 25, 1948, C. 646, 62 Stat.— (H.R. 3214), the relevant portions of which are as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) • • •
>
> (2) By appeal, where is drawn into question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) • • •"

B

Statute of the State the Validity of Which Is Involved

The statute of the State of California, the validity of which has been sustained by the Supreme Court of the State of California, the highest court of said state, as not being violative or repugnant to the provisions of the Constitution of the United States is section 536 of the Civil Code of the State of California as enacted in Statutes of 1905, Chapter CCCLXXXV, Page 491, of the Statutes of California which reads as follows:

> "CHAPTER CCCLXXXV
>
> An act to repeal Title VII of Part IV of Division First of the Civil Code and each and every section of such title, and to substitute a new Title VII to take the place thereof in said code, relating to telegraph and telephone corporations.
>
> (Approved March 20, 1905.)
>
> The people of the State of California, represented in senate and assembly, do enact as follows:
>
> Section 1. Title VII of Part IV of Division First of the Civil Code and each and every section of such

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title are hereby repealed, and a new Title VII is substituted in place thereof in said code to read as follows:

TITLE VII

TELEGRAPH AND TELEPHONE CORPORATIONS

Sec. 536. May use right of way along waters, roads, and highways.

Sec. 537. Liability for damaging telegraph or telephone property.

Sec. 538. Penalty for willfully or maliciously injuring telegraph or telephone property.

Sec. 539. Conditions on which damage to subaqueous cable may be recovered.

Sec. 540. May dispose of certain rights.

536. Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters. * * *" (For entire statute please see Appendix D).

C

Date of Judgment and Date of Application for Appeal

The final judgment of the Supreme Court of the State of California sought to be reviewed was rendered on the 13th day of August, 1948, and in accordance with subdivision (a) of rule 24, section 1 of Rule XXX of the rules adopted by the Judicial Council of California regulating the business of the Supreme Court, said judgment became final on the 13th day of September, 1948, and the application of appeal was presented to the Chief Justice of the Supreme Court of the State of California on the 19th day

of November, 1948. The opinion of August 13, 1948, was modified by decision on rehearing, dated September 8, 1948, but the judgment was left unchanged.

D

Nature of Suit and Rulings of the Supreme Court of the State of California

1. *General Nature of the Suit*

This suit was instituted by the County of Los Angeles, a body politic and corporate, as plaintiff, in the Superior Court of the State of California in and for the County of Los Angeles. The Complaint sets forth a cause of action for an accounting for the purpose of ascertaining the amount due and owing from the telephone corporation (appellee) to the county (appellant) under state statutes which authorize boards of supervisors of counties to grant franchises over the public roads and highways for all lawful purposes and which require the holders of such franchises to pay to the county two per cent (2%) of the gross annual receipts of the person, partnership, or corporation to whom the franchise is awarded arising from its use, operation or possession. (These Statutes are Section 26001, Govt. Code of the State of California and the Broughton Act, Statutes of 1905, page 777, as amended Deering's General Laws, Act 2720.) The complaint also prays for an injunction for the purpose of restraining the appellee telephone corporation from its continued use and occupancy of the county roads and highways until and unless the telephone corporation seeks and obtains from the County of Los Angeles a franchise for the use, occupancy and possession of the county roads and highways. The county filed its complaint on the 18th day of December, 1936. The telephone corporation filed an answer wherein it denied

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that it was a trespasser and alleged that it had the right to maintain its telephone system on county roads and highways. The answer also included five affirmative defenses. The first defense was predicated upon the allegation that the telephone corporation had complied with section 536 of the Civil Code of the State of California (Statutes 1905, page 492) and therefore had a franchise under that section. The second defense was based upon the allegation that the telephone system of the telephone corporation, pursuant to section 536, was a vested right. The third defense was predicated upon the theory that compliance with section 536 of the Civil Code of the State of California by the telephone corporation constituted a contract. The fourth defense was predicated upon the theory that prior decisions of the Supreme Court of the State of California constituted a rule of property. The fifth defense was that the county was estopped by its conduct. The sixth defense was that the county was guilty of laches.

It was the position of the County of Los Angeles before the Supreme Court of the State of California that the telephone company was not entitled to rely upon section 536 of the Civil Code of the State of California because:

a. *Section 536 of the Civil Code had been repealed.* The telephone company was not entitled to rely on section 536 of the Civil Code of the State of California as a grant of a free franchise for the reason that said section had been repealed by the Broughton Act (Statutes 1905, page 777; 1 Deering's General Laws, Act 2720).

b. *Section 536 of the Civil Code did not give the Telephone Company Free Use of the County Highways But Only the Corporate Power to Apply for a Franchise.* The telephone company was not entitled to rely on section 536 of the Civil Code of the State of California as granting to it a free franchise as even if section 536 of the Civil Code

was not repealed by the Broughton Act that said section did not constitute a grant of a free franchise to use the roads and highways but merely constituted a grant of corporate power to apply for a franchise under the Broughton Act which would require the telephone and telegraph corporations to pay for the use of the county roads and highways as do other holders of franchises.

c. *Section 536 of the Civil Code Violates the Constitution of the State of California.* The Southern California Telephone Company was not entitled to claim a franchise under section 536 of the Civil Code of the State of California because said section violated sections 22 and 31 of Article IV of the California Constitution because it constituted a grant of property or a gift of a thing of value to a private corporation which is expressly prohibited by the above-quoted sections of the California Constitution.

d. *Section 536 of the Civil Code Violates the Fourteenth Amendment of the Federal Constitution.* If the Court concluded that section 536 of the Civil Code of the State of California constituted a grant of a free franchise to the Southern California Telephone Company, which franchise was valid under State statutes and State constitutional provisions, then that section 536 was unconstitutional and violated the Fourteenth Amendment to the Federal Constitution. Said statute baldly creates one rule for natural persons, partnerships and corporations and a contrary rule for a telephone corporation and a telegraph corporation notwithstanding the fact that all are doing the same business with the general public and to the same end. The county contended that the validity of section 536 of the Civil Code of the State of California is drawn into question upon the ground that said statute improperly grants special privileges to telephone and telegraph corporations and invalidly discriminates in favor of telephone

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corporations and telegraph corporations and was therefore violative of section 1 of the Fourteenth Amendment to the Constitution of the United States.

For the purpose of assisting this Court in determining the general nature of this case and with particular reference to the history of Section 536, Civil Code of the State of California (Statutes 1905, page 492), reference may be had to the decision of this Court in the case of *Pomona* v. *Sunset Tel.* (224 U. S. 330, 56 L. Ed. 788, 32 S. Ct. 477).

2. *Rulings of the Court*

In rendering judgment, the Supreme Court of the State of California filed a majority and minority opinion. An examination of both the majority and minority opinions clearly indicates that the constitutionality of Section 536 of the Civil Code of the State of California (Statutes 1905, page 492) was drawn into question upon the ground that said statute is violative of Section 1 of the Fourteenth Amendment of the Constitution of the United States. In the majority opinion, attached hereto, the court stated:

> "It is further urged that Section 536, insofar as it applied only to corporations and not to individuals, improperly grants special privileges and invalidly discriminates in favor of corporations. It is asserted that the section violates the equal protection clause of the 14th Amendment to the Federal Constitution. • • • These provisions of the State and Federal Constitutions do not prevent classification by the Legislature, nor do they require that statutes operate uniformly with respect to persons or things which are in fact different."

Then follows in the opinion of the court more than three pages of discussion of the Federal question, at the con-

clusion of which the court said in deciding the Federal question adversely to the appellant:

> "There are general statements in *Frost* v. *Corporation Com.*, 278 U. S. 515 (49 S. Ct. 235, 73 L. Ed. 483), which, detached from their context, may appear to be out of harmony with the authorities cited above. The case, however, is clearly distinguishable. The legislation condemned in that decision exempted agricultural corporations issuing stock and organized for private gain, as well as true cooperatives, from the requirement of making a showing of public necessity in order to obtain a permit to operate a cotton gin. Individuals and other corporations desiring to engage in the same business for profit were required to make the showing. The corporation involved in the *Frost* case was an agricultural company issuing stock and organized for private gain. The court intimated that true cooperatives might be properly exempted but held that, in view of the subject dealt with by the legislation, there was no substantial or relevant basis for the differentiation between an agricultural corporation of the type there involved and individuals or other corporations organized for profit. The subject involved in the *Frost* case is entirely different from that dealt with in Section 536. As we have seen, there are sound purposes to be served in encouraging the corporate operation of telephone systems, and the classification complained of cannot, therefore, be said to be unreasonable or arbitrary."

Substantially all of the dissent is premised upon the fact that Section 536 of the Civil Code of the State of California (Statutes of 1905, page 492) does violate the equal protection clause of the Federal Constitution.

It is observed in the dissent:

> "In my opinion, this results in a violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution. While it is clear that the

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equal protection clause does not prevent a State Legislature from enacting statutes which contain a 'reasonable classification,' it is equally clear that it does prevent the States from enacting laws which create unreasonable discrimination."

Then follows over four pages of discussion supporting the conclusion that Section 536 of the Civil Code of the State of California creates an unreasonable discrimination which results in a violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

3. *Grounds Upon Which It Is Contended the Questions Involved Are Substantial*

The compulsory gift of a subsidy to a large corporation at the expense of the four million inhabitants of the County of Los Angeles in an improper discriminatory manner, involves a substantial Federal question.

The public interest of a large body of people as opposed to the financial business advantage of a telephone corporation is involved. The Federal Constitutional question is complex, real and substantial.

The question is neither frivolous, abstract nor formal.

The substantial Federal question is whether a large telephone corporation in California may obtain the free use of all roads and highways for its lines and poles while natural persons and partnerships engaging in precisely the same telephone business, together with water, gas, lighting, street and railroad corporations must pay a franchise fee to the County of Los Angeles for the use and occupancy of the roads and highways.

The nature and substance of the Federal question here presented is precisely that recognized and passed upon by the United States Supreme Court in the case of *Frost* v.

Corporation Com., 278 U. S. 515 (49 S. Ct. 235, 73 L. Ed. 483).

4. *Cases Believed to Sustain the Jurisdiction of the Supreme Court of the United States*

The judgment is final.

State of Indiana v. *Brand* (mem. 302 U. S. 678, 58 S. Ct. 262, 82 L. Ed. Adv. Op. 444).

The court is one of last resort.

Hamilton v. *Regents of the University of California* (293 U. S. 245, 55 S. Ct. 197, 79 L. E. 343.)

It is not necessary to attack the validity of an entire statute.

Dahnke-Walker Milling Co. v. *Bon Durant* (257 U. S. 282, 66 L. Ed. 239).

Unconstitutionality of the statute was sufficiently raised and decided adversely to appellant's claim.

People of New York ex rel. Bryant v. *Zimmerman* (278 U. S. 63, 73 L. Ed. 184, 49 S. Ct. 61);

Home Ice Company v. *Dick* (281 U. S. 397, 74 L. Ed. 926, 50 S. Ct. 338); *Rothschild* v. *Knight*, (184 U. S. 334, 46 L. Ed. 573, 22 S. Ct. 391).

The Federal questions raised are substantial.

Hamilton v. *Regents of the University of California* (293 U. S. 245, 5 S. Ct. 197, 79 L. Ed. 343).

The face of the record discloses that the Federal question arose in the State court and was expressly decided by the State court and the determination of the Federal question was necessary to the determination of the cause.

County of Los Angeles v. *Southern California Telephone Co.* (32 A. C. 403 and 32 A. C. 613), which is the

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opinion of the Supreme Court of the State of California in the present case and which is attached hereto.

The United States Supreme Court may assume jurisdiction to pass upon a Federal question where it clearly and unmistakably appears from the decision of the Supreme Court of the State that the Federal question was assumed to be an issue that the decision was against the claim of the Federal right and was essential to the judgment.

Chambers v. *Baltimore and O. R. Co.* (207 U. S. 142, 52 L. Ed. 143, 28 S. Ct. 34);

Cincinnati P. B. S. & P. Packet Company v. *Bay* (200 U. S. 179, 50 L. Ed. 438, 26 S. Ct. 208).

E

Stage in Proceedings and Method of Raising Federal Questions

The Federal question was raised in the Supreme Court of the State of California, upon its own motion, before its decision of August 13, 1948. Special briefs were written by both parties relating to the Federal question at the specific request of the Supreme Court of the State of California (pursuant to a communication of said court attached hereto), and the Supreme Court of the State of California in its opinion (copy of which is attached hereto) recognized both in the majority opinion and in the minority opinion that such questions were raised and the majority opinion decided them adversely to the appellant as set forth in sub-division 2 of part D of this Statement as to Jurisdiction and as set forth in the copy of the opinion attached hereto.

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal by virtue of the statutory provisions set forth in Part A of this Statement as to Jurisdiction.

F

The County of Los Angeles (Appellant) Is a Proper Party To Raise the Question of the Validity of Section 536 of the Civil Code of the State of California

1. *Supreme Court of the State of California in the Instant Case Recognized that the County of Los Angeles was the Proper Party to Raise the Invalidity of Section 536 of the Civil Code.*

The Supreme Court of the State of California in the case at bar recognized the right of the County of Los Angeles to urge the guarantee of the Constitution of the United States as grounds for the invalidity of the statute and held that the statute did not violate section 1 of the Fourteenth Amendment to the Constitution of the United States (please see opinion of the Supreme Court of the State of California attached hereto.)

2. *It Is the Established Law of California That One Affected by the Legislation May, Under the Circumstances of the Instant Case, Raise the Issue of Equal Protection of the Laws.*

It has been held that the unconstitutionality of a discriminatory statute can be urged by one *affected* by the legislation, even though not belonging to the class discriminated against when no member of the class discriminated against is in a position to raise the question. It is immediately apparent that no individual operating a telephone business is in a position to raise the question of discrimination under Sec. 536 of the Civil Code.

Van Camp Sea Food Co., Inc. v. *Newbert* (76 Cal. App. 445);

Quong Ham Wah Co. v. *Industrial Acc. Com.* (184 Cal. 26, 12 A. L. R. 1190, 192 Pac. 1021).

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Writ of Error dismissed in 225 U. S. 445, 65 L. Ed. 723, 41 S. Ct. 373.

Pacific Indemnity Co. v. *Myers* (211 Cal. 635).

3. *The Principle That One Affected by the Legislation May, Under the Circumstances of this Case, Raise the Issue of Equal Protection of the Laws, Is Recognized by the Supreme Court of the United States.*

Buchanan v. *Warley* (245 U. S. 60, 62 L. Ed. 149).

Respectfully submitted,

HAROLD W. KENNEDY,
County Counsel, and
A. CURTIS SMITH,
Assistant County Counsel, and
GERALD G. KELLY,
Deputy County Counsel,
Counsel for Appellant.

APPENDIX "A"

IN BANK

Filed:

L. A. No. 19311

THE COUNTY OF LOS ANGELES, a body politic and corporate,
Appellant

vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY, a corporation,
Respondent

GIBSON, C. J.—By this action for an injunction, plaintiff county is seeking to compel defendant telephone company to obtain a county franchise and to pay for the privilege of maintaining its lines and poles on streets and highways outside of incorporated areas. Defendant claims it was granted this privilege by section 536 of the Civil Code as amended in 1905, and that it is not required to obtain a franchise from the county. The trial court determined that defendant had a valid franchise, from the state, and denied an injunction. The county has appealed from the judgment.

In the years 1903-1905, the county issued five franchises for telephone lines, and these were thereafter conveyed to the defendant telephone company. Three of the franchises terminated before this action was commenced, and a fourth expired before the trial. The fifth franchise by its terms is still in effect, but the area which it covers was expressly excluded from this controversy by the complaint. Only one of the franchises required the payment of a percentage of the gross receipts derived from the use of the privilege, and the company made the payments, as provided, until expiration of the period specified therein. The company and its predecessors, at least since 1909, have specifically relied on section 536 for their authority when applying for permits to locate or change poles or lines on the highway. Further, from 1905 until about the time of the filing of the complaint, except for six years, the county assessed and levied property taxes on the franchise claimed by defendant and its predecessors under that section.

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The questions to be decided are: First, what is the effect of section 536? Second, was section 536 repealed by the Broughton Act? Third, if section 536 is construed as granting a franchise to defendant, it is unconstitutional (a) as being a gift in violation of sections 22 and 31 of article IV of the California Constitution or (b) as denying equal protection of the laws and constituting an invalid grant of special privileges in violation of the 14th Amendment to the federal Constitution and sections II and 21 of article I and section 25 of article IV of the California Constitution.

(1) Section 536 was originally enacted at the time of the adoption of the codes in 1872, but similar provisions had existed for many years prior thereto. (See Stats. 1850, p. 369; Stats. 1857, p. 171). When first enacted the section applied only to telegraph corporations. It made no mention of *telephone* companies, and it did not grant any rights to such companies prior to 1905, when the section was repealed and reenacted to apply to both telegraph and telephone corporations. (See *Sunset Tel. & Tel. Co.* v. *Pasadena*, 161 Cal. 265, 118 P. 796.) As applied to *telegraph* companies, it has been held that section 536, as it existed prior to 1905, was effectual to grant a state franchise, and that the use of the highways, and the maintenance and operation of the telegraph system, constituted an acceptance of the provisions of the statute and resulted in a contract between the company and the state which was secured by the federal Constitution against impairment by subsequent state legislation. (See *Western Union Tel. Co.* v. *Hopkins*, 160 Cal. 744, 87 P. 1023; *Postal Tel. Cable Co.* v. *Los Angeles*, 160 Cal. 129, 116 P. 566; *Sunset Tel. & Tel. Co.* v. *Pomona*, 172 F. 829, 837; *Postal Tel. Cable Co.* v. *Railroad Com.*, 200 Cal. 463, 254 P. 258).

The purpose of the change in 1905 was to add *telephone corporations* to the section, and, except for this extension, there is nothing in the amendment to indicate any intention to alter the effect and operation of the statute. (See *City of Salinas* v. *Pacific Tel. & Tel. Co.*, 72 Cal. App. 2d 494, 497, 164 P. 2d 905). In view of the construction given to this section as it existed prior to 1905, and the absence

of other changes, it must be held that the intention was to offer the grant of a franchise to telephone as well as telegraph companies upon acceptance by the construction and operation of communication facilities.

(2) A question has arisen, however, as to whether section 536 was repealed by the Broughton Act, which was adopted at the same session at which section 536 was amended. The act does not contain any provision expressly repealing that section, and it was not repealed by implication unless the statutes are so repugnant they cannot stand together. The Legislature was considering the statutes at the same time and must have intended to give effect to both. In *County of Inyo* v. *Hess*, 53 Cal. App. 415, 200 P. 373), it was held that section 536 was not repealed by the Broughton Act but that the statutes could operate in separate fields. The court said at page 425 "that under and by virtue of the provisions of section 536 of the Civil Code, telephone corporations are granted the right and privilege to use the public highways over which to construct and operate lines of telephone wires, free from any grant made by subordinate legislative bodies, and unrestricted by the provisions of the Broughton Act . . ." The court also declared that section 536 was intended as a legislative grant limited in operation to telegraph and telephone *corporations*, as distinguished from *individuals*. This construction is supported by the specific terms of the section which refers only to "telegraph or telephone corporations."

The Broughton Act, unlike section 536, does not grant any right or privilege, nor does it purport to empower or authorize boards of supervisors to grant franchises or other privileges, but instead indicates an intent to limit and restrict the powers which may have been granted under other laws by specifying the procedure which must be followed and the conditions which must be imposed in the granting of any franchise by subordinate legislative bodies. The court stated in *Oro Electric Corp.* v. *Railroad Com.* 169 Cal. 466, at pages 482-483 (147 P. 118), that "this act merely places restrictions upon the granting of franchises, where the power to grant such franchises exists otherwise. As was said in *Sunset Tel. & Tel. Co.* v. *Pasadena*, 161 Cal.

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265, 272 (118 P. 796), the 'whole purpose' of the act 'was to prescribe the method and conditions upon which the franchises included within its terms might be granted by the legislative body authorized by law to make the grant.' The act does not authorize any board or council to grant a franchise." (See also *McGinnis* v. *Mayor and Common Council*, 153 Cal. 711, 713-714, 96 P. 367; *City of San Diego* v. *Kerckhoff*, 49 Cal. App. 473, 482 (193 P. 801)). Since the Broughton Act is thus limited in operation to those franchises which subordinate legislative bodies are authorized to grant under other laws, it cannot be construed as applicable to statutory franchises which are not granted by such bodies but which, as in the case of the franchise involved here, are granted directly by the legislature. The two statutes were enacted for separate purposes and occupy separate fields, and both can be given effect. There is, therefore, no such repugnance between the acts as would require a determination that there was any implied repeal. Accordingly, defendant is entitled to use the streets and highways in unincorporated areas of the county, by reason of its franchise under section 536, unless that section, as claimed, is unconstitutional.

The county contends that the Legislature is prohibited by sections 22 and 31 of article IV of the California Constitution from granting a free franchise and that since no compensation is required to be paid for the rights acquired under section 536, the statute is unconstitutional. It does not follow, however, that because telephone and telegraph companies are permitted without charge to construct lines along the highways the privilege granted is a gift. The franchise is conditioned not only on the establishment of lines by a telegraph or telephone corporation, but also, by necessary implication, on the continued operation of the system. (4) The grant under section 536 must be construed in favor of the state. (Civ. Code, Sec. 1069). As so construed it must be held to be a grant to use public roads and highways so long as telegraph or telephone communication service is continued and that the acceptance of the franchise involves an assumption of the duty to furnish proper and adequate communication service to the public. Obviously, the state receives a substantial benefit from the

continued operation of such a system, and the question is whether, notwithstanding that benefit, the grant comes within the constitutional prohibition.

(5) Section 536 has been judicially construed by many decisions of this court, and it has been uniformly held that the statute is a continuing offer extended to telephone and telegraph companies to use the highways, which offer when accepted by the construction and maintenance of lines constitutes a binding contract based on adequate consideration, and that the vested right established thereby cannot be impaired by subsequent acts of the Legislature. (*Western Union Tel. Co.* v. *City of Visalia*, 149 Cal. 744 (87 P. 1023); *Western Union Tel. Co.* v. *Hopkins*, 160 Cal. 106 (116 P. 557); *Western Union Tel. Co.* v. *County of Los Angeles*, 160 Cal. 124 (116 P. 564); *Postal-Telegraph Cable Co.* v. *County of Los Angeles*, 160 Cal. 129 (166 P. 566); *Postal Telegraph Cable Co.* v. *Los Angeles*, 164 Cal. 156 (128 P. 19); *Sunset Tel. & Tel. Co.* v. *Pasadena*, 161 Cal. 265 (118 P. 796); *Postal-Telegraph Cable Co.* v. *Railroad Com.*, 200 Cal. 463 (254 P. 258); see *People* v. *Turlock Home Tel. & Tel. Co.*, 200 Cal. 546 (253 P. 1108); *County of Inyo* v. *Hess*, 53 Cal. App. 415 (200 P. 373); *State of California* v. *Marin Mun. W. Dist.*, 17 Cal. 2d 699 (111 P. 2d 651.)

The nature of the rights and privileges arising from section 536, as interpreted by the cases just cited, is stated in *Postal-Telegraph Cable Co.* v. *Railroad Com.*, 200 Cal. 463, at pages 472-473 (254 P. 258) as follows: "This section (536) constitutes a grant of a franchise which the state offered, and petitioner accepted by the construction of its lines. The rights acquired by the Telegraph Company, by accepting and availing itself of the provisions of the section, are vested rights which the constitutions, both state and federal, protect. They cannot be taken away by the state, even though the legislature should repeal the section, or by the people through a constitutional provision. . . . The finding of the respondent Commission of the physical fact that petitioner was maintaining and operating its lines of telegraph over the roads and highways of the state establishes, as a matter of law and fact, the proposition that it has accepted and owns a state franchise

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for that purpose, which was offered to it by section 536, *supra*. . . . The grant, resulting from the acceptance of the state offer, constituted a contract between the Telegraph Company and the state, secured by the constitution of the United States against impairment by any state legislation." (See also *City of Beverly Hills* v. *Los Angeles*, 175 Cal. 311 (165 P. 924).)

The prevalence of legislative grants to public utilities of the privilege of using streets and highways is shown by the following statement in *State of California* v. *Marin Mun. W. District*, 17 Cal. 2d 699, 703 (111 P. 2d 651): "The right obtained by defendant from these sources is a right conferred by the legislature to construct and operate pipe lines along the public highways of the state. Such a grant by the state to a public utility . . . has always been considered a franchise by the courts of this state. The right granted to municipal corporations by the statute of 1923 to use the public highways was held a franchise in *Los Angeles* v. *South Gate*, 108 Cal. App. 398 (291 P. 654). The right granted to public utilities by article XI, section 19 of the . . . Constitution . . . was held a franchise in *San Jose Gas Co.* v. *January*, 57 Cal. 614. . . . The right granted to telephone and telegraph companies by . . . section 536 (Civ. Code) . . . was held a franchise in *Western Union Tel. Co.* v. *Hopkins*, 160 Cal. 106 (116 P. 557); *Sunset Tel. & Tel. Co.* v. *Pasadena*, 161 Cal. 265 (118 P. 796), and *Postal-Telegraph Cable Co.* v. *Los Angeles*, 164 Cal. 156 (128 P. 19). The right granted to irrigation districts by a 1923 statute . . . for power lines was held a franchise in *Winkie* v. *Turlock Irr. Dist.*, 24 Cal. App. 2d 1 (74 P. 2d 302)."

The courts of other jurisdictions have held that the statutory offer of a franchise when accepted by the construction and operation of a public utility results in a valid contract secured by the federal Constitution against impairment. (*New York Electric Lines Co.* v. *Empire Subway Co.*, 235 U. S. 179, 193 (35 S. Ct. 72, 59 L. Ed. 184); *City Railway Co.* v. *Citizens' Street Railroad Co.*, 166 U. S. 557, 567 (17 S. Ct. 653, 41 L. Ed. 1114); *Chicago Gen. Ry. Co.* v. *City of Chicago*, 176 Ill. 253, 259 (52 N.E. 880, 68 Am. St. Rep.

188, 66 L.R.A. 959); see *State* v. *Southwestern Bell Telephone Co.*, 338 Mo. 617 (92 S.W. 2d 612); *Arkansas State H. Com'n* v. *Southwestern Bell T. Co.*, 206 Ark. 1099 (178 S. W. 2d 1002).)

The county seeks to avoid the effect of the long line of cases holding that the acceptance of the offer contained in section 536 and similar statutes resulted in a valid contract by asserting that those cases did not take into consideration the constitutional prohibition against gifts of public property and its historical background. It is argued that sections 22 and 31 of article IV of the state Constitution were enacted to prevent the waste of public funds and property by the appropriation of subsidies to railroads and other corporations, and that the privilege of using the highways for telephone lines is, in effect, a subsidy to a corporation operated for private profit. Although none of the opinions of this court construing section 536 discussed the possible effect of sections 22 and 31 of article IV, it would seem unlikely that the many judges and counsel participating in those cases entirely overlooked the legality of the consideration involved, since that was an essential requisite in each case to the holding that the acceptance of the offer of a franchise resulted in a valid contract.

In support of its contention that a public benefit cannot be a valid consideration for the grant of a limited privilege to use the highways for the construction and maintenance of telephone lines, the county relies upon the case of *Higgins* v. *San Diego Water Co.*, 118 Cal. 524 (45 P. 824, 50 P. 670), asserting that the consideration involved there is identical with that which must be urged to support the contract in the present case. The city of San Diego subleased from defendant water company its distributing system for the term of 20 years at a fixed monthly rental, and the company agreed as part of the consideration that it would construct a railroad line. The agreement was held to be invalid on the ground that the charter of San Diego conferred no authority upon the council to expend any portion of the municipal funds in aiding the building of railroads. The court expressly declined to determine whether the contract violated the constitutional prohibition against gifts, and the decisions therefore is not authority here.

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There is language in the opinion, however, which intimates that some of the evils which the constitutional restriction was designed to prevent were present in the transaction involved in that case.

Courts in other jurisdictions with similar constitutional prohibitions have held in factual situations comparable to that involved in the Higgins case that the general public benefit derived from the construction of a public utility system is insufficient consideration to support direct appropriations of public money, extensions of public credit, or outright grants of property. (*Lord* v. *Denver*, 58 Colo. 1 (143 P. 284, Ann. Cas. 1916C 893, L. R. A. 1915B 306); *Colorado Central R. R. Co.* v. *Lea*, 5 Colo. 192; *Southern Railway Co.* v. *Hartshorne*, 162 Ala. 491 (50 So. 139); *Stone* v. *State*, 223 Ala. 426 (136 So. 727).) On the other hand, the only cases which have considered franchises of the character involved here hold that the grants are valid and do not contravene constitutional prohibitions against gifts. (*State* v. *Southwestern Bell Telephone Co.*, 338 Mo. 617 (92 S.W. 2d 612); *State* v. *Union Electric Co. of Missouri* (Mo. App.), 142 S.W. 2d 1099; *Arkansas State H. Com'n* v. *Southwestern Bell T. Co.*, 206 Ark. 1099 (178 S.W. 2d 1002).)

There appears to be some basis for the distinction although it has not been pointed out in the cases. (6) A franchise such as is authorized by section 536 is not an absolute grant in fee or an appropriation of money, but is merely a limited right to use the highways and only to the extent necessary for the furnishing of services to the public. Also, the privilege must be exercised "in such manner and at such points as not to incommode the public use of the road or highway." (Civ. Code, Section 536.) It is obvious that the right acquired by the company is of less substance than the transfers involved in the cited cases which condemn appropriations of money and grants in fee.

Moreover, the state is assured of a continuing benefit in return for the privileges granted under section 536, whereas this may not be true in transactions involving an outright appropriation or transfer in fee. The company must not only construct a telephone system but it must render service, and if it fails to do so the franchise terminates.

Thus the state receives benefits during the life of the franchise, since in order to retain it the company must continue to serve the public. If and when the public benefit ceases and the franchise expires, the state is in as good a position as it was before the limited privilege was granted. The building of a public utility and the consequent benefit to the people may not be a sufficient consideration to support a grant in fee, but it does not follow that the benefit received from the construction and continued operation of a telephone system is not an adequate return for the use of the highways so long as the public service continues.

(7) Since the offer of a franchise in section 536, when accepted, results in a binding agreement supported by a valid consideration, there is no gift within the meaning of the constitutional prohibitions.

(8) It is further urged that section 536, insofar as it applies only to corporations and not to individuals, improperly grants special privileges and invalidly discriminates in favor of corporations. It is asserted that the section violates the equal protection clause of the 14th Amendment to the federal Constitution, and also that it is invalid under article I, sections 11 and 21, and article IV, section 25, subdivisions 19 and 33 of the state Constitution.

These provisions of the state and federal Constitutions do not prevent classification by the Legislature, nor do they require that statutes operate uniformly with respect to persons or things which are in fact different. (*People* v. *Western Fruit Growers*, 22 Cal. 2d 494 (140 P. 2d 13); *McCreery* v. *McColgan*, 17 Cal. 2d 555 (110 P. 2d 1051, 133 A. L. R. 800); *In re Fuller*, 15 Cal. 2d 425, (102 P. 2d 321); *Bueneman* v. *City of Santa Barbara*, 8 Cal. 2d 405 (65 P. 2d 884, 109 A. L. R. 895); *Tigner* v. *Texas*, 310 U. S. 141 (60 S. Ct. 879, 84 L. Ed. 1124); *Puget Sound Co.* v. *Seattle*, 291 U. S. 619 (54 S. Ct. 542, 78 L. Ed. 1025); *Radice* v. *New York*, 264 U. S. 292 (44 S. Ct. 325, 68 L. Ed. 690); *Arkansas Nat. Gas Co.* v. *Railroad Com.*, 261 U. S. 379 (43 S. Ct. 387, 67 L. Ed. 705).)

The problem presented by the difference in treatment accorded corporations and individuals under section 536 was directly passed upon in *Western Union Tel. Co.* v. *Hop-*

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kins, 160 Cal. 106 (116 P. 557), and *Postal Tel. Cable Co.* v. *Los Angeles*, 160 Cal. 129 (116 P. 566), where the claim was made that section 536 was invalid because the offer of a franchise contained therein was limited to corporations. In the *Hopkins* case the court, in holding that there was no violation of the constitutional provisions relating to special legislation, said (p. 122): "We may reasonably assume that good and sufficient reasons may be apparent to the legislature why the right to exclusively occupy portions of the public highways for the purposes specified should be confined to corporations organized and existing for the purpose of doing a telegraph business, and why such corporations constitute a class to which such a grant may properly be restricted without violating our constitutional provisions against special legislation. If it may reasonably be so assumed the legislation must be upheld, for it is well settled that to warrant a court in adjudging legislation void on this ground it must clearly appear that there was no sufficient reason to warrant the legislative department in finding a difference and making the discrimination. Every presumption is in favor of the validity of an act of the legislature, until its invalidity is made to appear."

Although the *Hopkins* case makes no specific reference to the equal protection clause of the 14th Amendment, it is clear that the test for determining the validity of a statute where a claim is made that it unlawfully discriminates against any class is substantially the same under the State prohibitions against special legislation and the equal protection clause of the Federal Constitution. (*People* v. *Western Fruit Growers*, 22 Cal. 2d 494, 506 (140 P. 2d 13); see *McCreery* v. *McColgan*, 17 Cal. 2d 555 (110 P. 2d 1051, 133 A. L. R. 800); *In re Fuller*, 15 Cal. 2d 425 (102 P. 2d 321); *Bueneman* v. *City of Santa Barbara*, 8 Cal. 2d 405 (65 P. 2d 884, 109 A. L. R. 895).) In the *Western Fruit Growers* case the court, after noting the general rules on this subject, stated: "Problems of classification under the California Constitution are thus similar to those presented by the Federal equal protection of the laws clause of the 14th Amendment. Under either provision, the mere production of inequality which necessarily results to some degree in every selec-

tion of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be 'actually and palpably unreasonable and arbitrary,' or the legislative determination as to what is a sufficient distinction to warrant the classification will not be overthrown. (Citations.) When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification." (22 Cal. 2d 494, 506.)

It is argued, however, that the portion of the opinion in the *Hopkins* case dealing with the assertedly invalid distinction between individuals and corporations was dictum for the reason that the telegraph company had commenced business and acquired rights under the Constitution of 1849, which contained no inhibition against special legislation. However, in the companion case of *Postal Tel. Cable Co.* v. *Los Angeles*, 160 Cal. 129 (116 P. 566), decided at the same time and controlled by the *Hopkins* decision, the plaintiff company did not commence business or acquire any rights until after the adoption of the Constitution of 1879, and therefore the issue was necessarily before the court.

The reasons which may have motivated the enactment of section 536 were not discussed in the *Hopkins* case, but it must be presumed that the Legislature acted in response to a reasonable basis for classification and that the differentiation was based on adequate grounds if any such basis can reasonably be said to exist. There is ample justification for treating corporations differently from individuals in granting franchises for the operation of telephone and telegraph systems, and there is a reasonable basis for the classification of corporations as the sole recipients of the grant offered in section 536. Corporations are in a better position than individuals to finance and carry on statewide projects of this nature, they are more easily regulated and supervised, and they have much greater permanency of existence and can give better assurance of uninterrupted service. It may be that one of the purposes of section

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536 was to promote the establishment of statewide communication systems, and the use of corporate ownership and management may have been considered the best method of achieving that purpose.

Statutes similar to section 536, and applying to telephones and telegraphs or to railroads, exist in most of the other states of the Union, but no case has been found in which such a statute was held unconstitutional on the ground of improper discrimination. On the contrary, where the objection has been raised, the power to limit the granting of franchises has been upheld. In *Goddard* v. *Chicago & N. W. Ry. Co.*, 202 Ill. 362 (66 N. E. 1066), an act provided that a street railroad corporation might use the streets and highways outside of cities and towns with the consent of the county board, but did not authorize such use by individuals. It was held that the Legislature by limiting grants to incorporated companies did not violate the state or federal Constitutions. Other courts have held that banking, insurance and similar businesses may be restricted to corporations. See *Noble State Bank* v. *Haskell*, 219 U. S. 104 (31 S. Ct. 186, 55 L. Ed. 112); *Shallenberger* v. *First State Bank*, 219 U. S. 114 (31 S. Ct. 189, 55 L. Ed. 117); *Engel* v. *O'Malley*, 219 U. S. 128 (31 S. Ct. 190, 55 L. Ed. 128); *Dillingham* v. *McLaughlin*, 264 U. S. 370, 373 (44 S. Ct. 362, 68 L. Ed. 742); *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 416 (34 S. Ct. 612, 58 L. Ed. 1011); *Commonwealth* v. *Vrooman*, 164 Pa. 306 (30 A. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250); *Brady* v. *Mattern*, 125 Iowa 158 (100 N. W. 358, 106 Am. St. Rep. 291).)

There are general statements in *Frost* v. *Corporation Com.*, 278 U. S. 515 (40 S. Ct. 235, 73 L. Ed. 483), which, detached from their context, may appear to be out of harmony with the authorities cited above. The case, however, is clearly distinguishable. The legislation condemned in that decision exempted agricultural corporations issuing stock and organized for private gain, as well as true cooperatives, from the requirement of making a showing of public necessity in order to obtain a permit to operate a cotton gin. Individuals and other corporations desiring to engage in the same business for profit were required to

make the showing. The corporation involved in the Frost case was an agricultural company issuing stock and organized for private gain. The court intimated that true cooperatives might be properly exempted but held that, in view of the subject dealt with by the legislation, there was no substantial or relevant basis for the differentiation between an agricultural corporation of the type there involved and individuals or other corporations organized for profit. The subject involved in the Frost case is entirely different from that dealt with in section 536. As we have seen, there are sound purposes to be served in encouraging the corporate operation of telephone systems, and the classification complained of cannot, therefore, be said to be unreasonable or arbitrary.

(9) The rule that all presumptions are in favor of the validity of statutes and that a classification made by the Legislature will not be overthrown by the courts unless it is palpably unreasonable has added force when, as here, the statute has been accepted as valid for many years, and vast sums have been invested in reliance upon the rights granted. In *Willard* v. *Glenn-Colusa Irr. Dist.*, 201 Cal. 726 (258 P. 959), where attack was made on the constitutionality of section 55 of the California Irrigation District Act, the court said (pp. 743-744): "It has been upon the statute books of this state for over forty years. While its constitutionality has never been passed upon by this court, this question, so far as our knowledge goes, has never been raised. It is hardly possible that in all the litigation that has been before the courts of this state regarding irrigation districts in their various ramifications, the valdity of this provision of the statue would not have been attached had there been any question of its constitutionality. The fact that no proceeding prior to the present one has ever been brought before this or any of the appellate courts of this state in which the constitutionality of this provision of the statute has been questioned is most convincing proof that the profession as a whole has regarded its validity unassailable."

Stronger and even more convincing proof may be found in the legal history of section 536. Its provisions relating

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to telegraph companies have been in existence since 1872, and those applying to telephone companies have been in effect since 1905. The constitutionality of the section has been impliedly upheld by many decisions of this court, and in the few instances where a direct challenge has been made it has withstood the attack. These decisions have been acquiesced in and acted upon for more than 40 years and have become something akin to a rule of property which should not be disturbed in the absence of the most compelling and cogent reasons. We find no such reasons here.

The judgment is affirmed.

Shenk, J., Traynor, J., Schauer, J., and Spence, J., concurred.

Edmonds, J., concurred in the judgment.

APPENDIX "B"

CARTER, J.—I dissent.

By permitting section 536 of the Civil Code and the Broughton Act to stand side by side, the majority opinion in effect affirms the holding in *Inyo* v. *Hess*, 53 Cal. App. 415 (200 P. 373), that the two statutes have the effect of giving to telephone and telegraph corporations the right to erect and maintain lines along public highways and streets free of any burden whatsoever while every other person or association must comply with a number of regulations and pay money for the same right. Thus the majority perpetuates the type of special privilege conferred upon corporations which is reminiscent of the decade when this legislation was adopted.

In my opinion, this results in a violation of the equal protection clause of the Fourteenth Amendment to the federal Constitution. While it is clear that the equal protection clause does not prevent a state Legislature from enacting statutes which contain a "reasonable classification," it is equally clear that it does prevent the states from enacting laws which create unreasonable discrmination. The majority opinion asserts that the differentiation here involved

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is a "reasonable classification." To support this argument, eight cases are cited. (*Goddard* v. *Chicago & N. W. Ry. Co.*, 202 Ill. 362 (66 N. E. 1066); *Noble State Bank* v. *Haskell*, 219 U. S. 104 (31 S. Ct. 186, 55 L. Ed. 112); *Shallenberger* v. *First State Bank*, 219 U. S. 114 (31 S. Ct. 189, 55 L. Ed. 117); *Engel* v. *O'Malley*, 219 U. S. 128 (31 S. Ct. 190, 55 L. Ed. 128); *Dillingham* v. *McLaughlin*, 264 U. S. 370 (44 S. Ct. 362, 68 L. Ed. 742); *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389 (34 S. Ct. 612, 58 L. Ed. 1011); *Commonwealth* v. *Vrooman*, 164 Pa. 306 (30 A. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250); *Brady* v. *Mattern*, 125 Iowa 158 (100 N. W. 358, 106 Am. St. Rep. 291).)

All eight of these cases involved statutes making distinctions between classes of the public. In all eight of the cases, the statutes were upheld as not violative of the Constitution. But the basis of the holdings in seven of the eight cases was that the statutes constituted an exercise of the police power, so-called. This power of the states to make regulations which, while they abridge the rights of some of the citizens, are nevertheless necessary and justified in the interest of the general public, can be invoked only in cases where there is a danger to the general public. A classification may be validly made when it has a reasonable tendency to combat a specific evil. ". . . (to) justify the imposition of a burden, there must be some connection of causation or responsibility between the person selected or the right impaired and the danger to the public welfare or the public burden which is sought to be avoided or relieved." (Freund, Police Power, 635.) This element of public danger was present in seven of the cases mentioned. In *Nobel State Bank* v. *Haskell*, 219 U. S. 104 (31 S. Ct. 186, 55 L. Ed. 112), the issue was whether anyone desiring to engage in the business of banking could be required to form a corporation, submit to certain inspections and contribute to an insurance or guaranty fund. The evil which this regulation was designed to check was the frequent failure of individuals engaged in the banking business to meet their obligations, and the resulting insecurity of commercial paper, especially checks. The Supreme Court of the United States said: "If the . . . legislature declares . . . that incorporation, inspection

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and the above-described cooperation are *necessary safeguards*, this court certainly cannot say that it is wrong." *Nobel State Bank* v. *Haskell, supra.*) (Emphasis added.) *Shallenberger* v. *First State Bank*, 219 U. S. 114 (31 S. Ct. 189, 55 L. Ed. 117), involved practically the same situation and is based on the same reasons as the Nobel State Bank case. *Engel* v. *O'Malley*, 219 U. S. 128 (31 S. Ct. 190, 55 L. Ed. 128), and *Dillingham* v. *McLaughlin*, 264 U. S. 370 (44 S. Ct. 362, 68 L. Ed. 742), both involved control of a type of business apparently common to New York during the years of heavy immigration. There, individuals would act as depositaries of small savings deposits made by recent immigrants. A substantial number of these depositaries seems to have absconded with the money so deposited and, of course, the low-income, unsophisticated depositors were nearly helpless. To eliminate this danger and still enable this particular group of depositors to make their small deposits, various statutory enactments were passed which subjected these individual depositaries to rather strict regulations but exempted from the operation of the regulations banks duly incorporated. Failure on the part of the depositaries to comply with the regulations, such as putting up a bond and submitting to inspections, was made a misdemeanor. Statutes of this type were therefore obviously designed to check an evil and if any further test be needed, the criminal character of the statute is the best indication that the protection of the public was at its basis. In *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389 (34 S. Ct. 612, 58 L. Ed. 1011), a statute imposing a number of regulations on insurance companies was attached on the ground that it expressly exempted farmers' cooperative insurance associations from its regulations. The provisions of the statute were regulatory only and it was held that the classification was entirely reasonable because the members of a cooperative farmers' insurance association are in a far better position to police their own organization than members of the public who deal with unincorporated and unregulated insurers.

The next two cases cited are not binding on this court because they were decided by state courts. But they are

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equally based on the principle of protection of the public so that they are not only not binding but also inapplicable. *Commonwealth* v. *Vrooman*, 164 Pa. 306 (30 A. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250), was a criminal prosecution under a statute making it a misdemeanor for any person other than a corporation to engage in the insurance business. The decision upholding the distinction is based on the police power and the need of the public for protection. *Brady* v. *Mattern*, 125 Iowa 158 (100 N. W. 358, 106 Am. St. Rep. 291), was a petition for a writ of habeas corpus by a contractor who had been arrested after violating a statute which placed rather stringent controls on individual contractors and required them to put up bonds but exempted corporate contractors and building and loan associations from such controls. The petitioner attached the constitutionality of the discrimination and the court based its refusal to grant the writ on the fact that the protection necessary to safeguard the public made the classification reasonable.

In the case at bar, there is no pretence that the discrimination is in any way designed to protect the general public from the risks involved if it is permitted to deal with unincorporated telephone and telegraph operators. The absence of this element renders section 536 of the Civil Code unconstitutional. It makes a distinction between private persons and partnerships on one side and telephone and telegraph corporations on the other. This distinction would result in a reasonable classification if public welfare were at all involved. Since public welfare is not involved, the distinction results in a discrimination prohibited by the equal protection clause of the Fourteenth Amendment.

The one case cited in the majority opinion which has not been dealt with does seem to state the rule that the policies behind legislation are not open to inquiry by the courts. *Goddard* v. *Chicago & N. W. Ry. Co.*, 202 Ill. 362 (66 N. E. 1066). In that case the argument was made that legislation which permitted a county board to issue permits for the construction of railroads to corporations only was in violation of the state and federal Constitutions. The court brushed this argument aside, saying: "The legislature had

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power to limit the authority of the county board to grant a license to incorporated companies created . . . for the purpose of constructing and operating street railways, and it is not material what reason existed for prescribing the limit. It was a case for the exercise of legislative judgment with which we are not concerned." (*Goddard* v. *Chicago & N. W. Ry. Co., supra.*) It is submitted that the court was clearly wrong in stating this flat rule. The moment a classification or discrimination is created, the question of whether it shall stand or fall is very much the concern of the courts. It is simply not true that the Legislature can exercise unlimited discretion when it creates such classifications. The majority opinion recognizes this and correctly states the rule that discriminatory legislation must fall unless reasonable and nonarbitrary. The Goddard case, in failing to recognize this rule, would therefore fall even under the view taken by the majority. Besides, being a state case it is not binding here and its persuasive force is dissipated by the case of *Frost* v. *Corporation Com.*, 278 U. S. 515 (49 S. Ct. 235, 73 L. Ed. 483), which controls the Goddard case as well as the case at bar.

The Frost case, supra, shows that the result reached by the majority is wrong. The distinction created by section 536, the Broughton Act and the decision in this case is not a reasonable classification: It is an unreasonable discrimination. The present case falls clearly within the rule of the Frost case as it is much stronger on the facts. In the Frost case, a statute required persons and nonagricultural corporations who wished to engage in the ginning of cotton to make a showing of public necessity as a condition precedent to their being able to obtain a license. Cooperative associations were exempt from this requirement. Under the general laws of the state involved, a cooperative association was free to sell its services to the public and make a profit out of such dealings. The court held that the distinction created an unreasonable classification. ". . . the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, . . . it produces a classification which subjects

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one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation." (Frost v. Corporation Com., supra, 522.)

In the case at bar, mere enumeration of some of the requirements set forth in the Broughton Act will show that a greater burden results in this case than that of showing a public necessity in the Frost case. Under the Broughton Act, a bidder for a franchise must—unless he is a telephone or telegraph corporation—submit sealed bids, must make immediate payment of a substantial sum if the franchise is struck off to him at the auction, must make an additional large payment within 24 hours, and must pay a tax of 2 per cent on the gross receipts every year. There are other provisions, but those set forth show sufficiently the great disparity created between the privileges enjoyed by corporations under section 536 and those enjoyed by individuals and associations under the Broughton Act.

The classification is unreasonable and discriminatory because nothing is gained through it by anyone including the state, except the corporations which are exempt from the burdens of the Broughton Act. Operators other than those favored few are evidently just as acceptable to the Legislature, provided they pay for the privilege given free to those favored few. Just as in *Frost* v. *Corporation Com., supra,* both are engaged in exactly the same type of business, for the same purpose. Both would be public utilities. It is obvious, therefore, that no consideration of public welfare could have been in the back of the legislators' minds. No real reason for the classification is shown. The majority opinion indulges in conjecture as to what some of these reasons might have been. That, however, is not a proper solution. The Supreme Court of the United States has laid down the rule that the reasons for the classification must be apparent in order for it to have any chance of being sustained: "To assume that some unnamed public interest exists, which will sustain the discrimination, does not help the matter here; because the assumption can rest only on

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surmise, with nothing concrete or explicit appearing to support it or to indicate a legislative intent to relate the exemption to any public purpose." (*Colgate* v. *Harvey*, 296 U. S. 404, 425 (56 S. Ct. 252, 80 L. Ed. 299, 102 A. L. R. 54).) The last-cited case involved income tax legislation under which income from investments within the state was favored over that derived from out-of-state investments. The state courts held that such a statute "might" have the purpose of encouraging investments within the state. The Supreme Court answered that contention in the words quoted *supra*. The suppositions made by the majority opinion in the case at bar are open to the same criticism.

Two more points are raised which purportedly lend support to the holding of the majority: One, that the question of constitutionality of these statutes has been before this court and has been decided and that therefore the classification and the subsequent reliance thereon became tantamount to a rule of property which this court should not disturb except for compelling reasons. Literally speaking, the statement that the constitutionality of the combined effect of these statutes has been before this court is true. The statement, however, contains an ambiguous term: "Constitutionality." If this word can be construed to include the state Constitution alone, the statement would be correct. *Western Union Tel. Co.* v. *Hopkins* and its companion cases, 160 Cal. 106 ff. (116 P. 557), did pass on the question whether the California Constitution was violated. But the court expressly recognized that nothing more than one single section of the California Constitution had been raised by counsel. The court found that that section had not been violated (art. I, sec. 11), and discussed one other aspect of the case under the California Constitution. The federal Constitution was not mentioned. How a holding of this kind can result in a "rule of property" is very difficult to conceive. The federal question is before this court for the first time in this case. There is no reason why it should not be squarely met.

The other contention is that no "compelling and cogent reasons" exist in this case for a change of the status of telephone and telegraph corporations under what they conceived the law to be. I believe that such reasons do exist.

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Under the majority holding the counties will receive no revenue out of franchises operated by telephone or telegraph corporations. In order to meet the requirements of the various budgets involved, the tax rate in those counties is therefore correspondingly higher than it would be if these corporations were subjected to the same duty to pay now resting on the balance of the operators. By subjecting telephone and telegraph corporations to the terms of the Broughton Act and by requiring them to make the payments called for by the act, the revenue of the counties will increase and the tax rate will decrease correspondingly. The result will be a higher operating cost for telephone and telegraph corporations. But, contrary to the contention made by these corporations, this will not have any "disastrous effects" on them. They are given the means of obtaining permission to charge higher rates (Stats. 1915, p. 115 as amended, 2 Deering's Gen. Laws, Act 6386, Sec. 61 ff.) and will not, as they seem to contend, be driven into bankruptcy. The higher rates which telephone and telegraph corporations may then charge for their services will place the burden of paying for the use of public streets and highways where it belongs: On the subscribers to telephone and telegraph services rather than the taxpayers at large. That, in my opinion, is a reason sufficiently cogent and compelling to make a change, even if a settled situation had existed up to now. Mere lapse of time will never breathe the breath of life into a statute void for unconstitutionality, and the attempt to uphold the statute on this ground evinces a fatal weakness in the basic concept upon which the majority opinion is predicated.

The equal protection clause of the Fourteenth Amendment to the Constitution of the United States has been given renewed vigor by several recent decisions of the Supreme Court of the United States, and in view of this trend I do not anticipate that that court will depart from its pronouncement in the Frost case which is in clear conflict with the holding of the majority in the case at bar.

It is, therefore, my opinion that the judgment should be reversed.

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APPENDIX "C"

OFFICE OF THE CLERK

SUPREME COURT OF CALIFORNIA

William I. Sullivan, Clerk

San Francisco, California, December 2, 1947

Mr. Harold W. Kennedy, County Counsel, 1100 Hall of Records, Los Angeles, California.
Lawler & Felix, Attorneys at Law, 605 W. Olympic Blvd., Los Angeles, California.
Pillsbury, Madison & Sutro, Attorneys at Law, Standard Oil Building, San Francisco, California.

Re: L. A. 19311, County of Los Angeles v. Southern California Telephone Co.

Gentlemen:

The court today vacated the submission in the above entitled cause in order to permit the filing of briefs upon the following questions:

1. If, in order to reconcile Civil Code Sec. 536 and the Broughton Act, Sec. 536 is construed to apply only to telegraph and telephone *corporations* and not to *inviduals* (see County of Inyo v. Hess, 53 C. A. 415, 423), would there be an unconstitutional discrimination and denial of equal protection of the laws, on the ground that only an individual and not a corporation would have to pay a franchise fee to use the highways is granted only to corporations and not to individuals? (See Frost v. Corporation Com., 278 U. S. 515.) Is there any basis for a holding that there was a reasonable classification or that it was justifiable under police power?

2. Have either of the parties to this action the proper standing to raise the constitutional question of discrimination, or can this question be raised only by an individual who has been harmed?

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3. Assuming that there would be unconstitutional discrimination under the above construction of the statutes, would Sec. 536 alone be unconstitutional or would both Sec. 536 and the Broughton Act, insofar as it applies to telephone lines, be unconstitutional? (Compare Speegle v. Board of Fire Underwriters, 29 Cal. (2d) 34, 47-48, and cases there cited.)

4. If both Sec. 536 and the Broughton Act are unconstitutional, insofar as telephone franchises are concerned, is there any other statutory authority which would permit the county to impose the franchise fees involved here?

The cause will be placed on the Los Angeles Calender to be called at 9:30 A.M. on Thursday, January 8, 1948, at which time counsel may orally argue. The briefs should therefore be concurrently filed not later than January 5, 1948 in order to permit of examination thereof by the court before the cause is called for argument.

The Los Angeles Calender will be made up shortly and you will be supplied with further information with respect thereto. I am enclosing herewith the usual questionnaire which should be filled out and returned to this office at the earliest opportunity.

Very truly yours,

(S.) WILLIAM I. SULLIVAN,
Clerk of Supreme Court.

CC: O'Melveny and Myers, (A.C.), Attorneys at Law, 900 Title Insurance Building, Los Angeles, California.
JBD, REG, LA.

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APPENDIX "D"

CHAPTER CCCLXXXV

An act to repeal Title VII of Part IV of Division First of the Civil Code and each and every section of such title, and to substitute a new Title VII to take the place thereof in said code, relating to telegraph and telephone corporations.

(Approved March 20, 1905)

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. Title VII of Part IV of Division First of the Civil Code and each and every section of such title are hereby repealed, and a new Title VII is substituted in place thereof in said code to read as follows:

TITLE VII

TELEGRAPH AND TELEPHONE CORPORATIONS

Sec. 536. May use right of way along waters, roads and highways.
Sec. 537. Liability for damaging telegraph or telephone property.
Sec. 537. Penalty for willfully or maliciously injuring telegraph or telephone property.
Sec. 539. Conditions on which damage to subaqueous cable may be recovered.
Sec. 540. May dispose of certain rights.

536. Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

537. Any person who injures or destroys, through want of proper care, any necessary or useful fixture of any telegraph or telephone corporation, is liable to the corporation

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for all damages sustained thereby. Any vessel which, by dragging its anchor, or otherwise, breaks, injures, or destroys the subaqueous cable of a telegraph or telephone corporation, subjects its owner to the damages hereinbefore specified.

538. Any person who willfully and maliciously does any injury to any telegraph or telephone property, mentioned in the preceding section, is liable to the corporation for one hundred times the amount of actual damages sustained thereby, to be recovered in any court of competent jurisdiction.

539. No telegraph or telephone corporation can recover damages for the breaking or injuring of any subaqueous telegraph or telephone cable, unless such corporation has previously erected on either bank of the waters under which the cable is placed, a monument, indicating the place where the cable lies, and publishes for one month in some newspaper most likely to give notice to navigators, a notice giving a description and the purpose of the monuments, and the general course, landings, and termini of the cable.

540. Any telegraph or telephone corporation may at any time, with the consent of the persons holding two thirds of the issued stock of the corporation, sell, lease, assign, transfer, or convey any rights, privileges, franchises, or property of the corporation, except its corporate franchise.

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IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1948

No. .....

COUNTY OF LOS ANGELES, a body politic and corporate,
Appellant,

vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY, a corporation,
Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Preliminary Statement

The appellant County of Los Angeles brought an action against the appellee telephone corporation to compel it to account for the value of the use of the County streets under general laws which authorize the

County to grant franchises for all lawful purposes[1] and providing that in the granting of such franchises the holders thereof must pay (in addition to the amount bid for the franchise) two per cent (2%) of the gross receipts resulting from the use of the franchise.[2]

As a defense the telephone corporation invoked section 536 of the Civil Code,[3] providing, as construed by California courts, that telephone and telegraph cor-

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[1]Said statute as presently codified is section 26001 Government Code of the State of California, reading as follows: "The board may grant franchises along and over the public roads and highways for all lawful purposes, upon such terms, conditions, and restrictions as in its judgment are necessary and proper, and in such manner as to present the least possible obstruction and inconvenience to the traveling public.

"Any general law applicable to the granting of franchises by municipal corporations and counties throughout the state shall be complied with in the granting of any franchise by the board of supervisors."

The predecessors of section 26001 Government Code are subdivision 35 of section 25 of the County Government Act of 1897, Stats. of 1897, page 452, and section 4041.9 of the Political Code of the State of California.

[2]The Franchise Sales Law of the State of California, Stats. 1905, page 777, as amended, (commonly known as the Broughton Act. Deering Act 2720), reading in part as follows: "Section 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or interurban railroads upon any public street or highway, to lay gas-pipes for the purpose of carrying gas for light, heat or power, to erect poles or wires for transmitting electricity for light, heat or power, along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees or common councils, or other governing or legislative bodies of any county, city and county, city or town within this state, except steam railroads and except telegraph or telephone lines doing an interstate business and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise. The grantor may, however, in such franchise impose such other and additional terms and conditions not in conflict herewith, whether governmental or contractual in character, as in the judgment of the legislative body thereof are to the public interest.

"Section 2. . . .

"Section 3. . . . that the successful bidder and his assigns must, during the life of said franchise, pay to the county or municipality two per cent (2%) of the gross annual receipts of the person, partnership or corporation to whom the franchise is awarded, arising from its use, operation or possession. . . . "

---

[3]Section 536 of California Civil Code: "Telegraph or telephone corporations may construct lines of telegraph, or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

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porations (and no other persons or corporations) are offered a free franchise which when accepted by the user constitutes a contract and a property right.

It should be noted that section 536 was no part of County's case and that it was invoked by a party in the "favored" class.

The County objected to such defense on several State grounds of constitutionality and statutory construction and finally upon the ground that said section 536 Civil Code violated the first section of the 14th Amendment of the Federal Constitution in denying equal protection of the laws to all persons, associations and corporations other than telephone or telegraph corporations. Not only is the free franchise withheld from natural persons engaging in the telephone business but it is withheld from corporations engaging in other public utility businesses such as electric light and power companies, gas companies and water companies. It boldly creates one rule for telephone and telegraph corporations and a different and contrary rule for all others. It is comparable to the situation described by this Honorable Court in *Frost v. Corporation Commission*, 278 U. S. 515, at 524, 73 L. Ed. 483, as follows:

> "Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, boldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits."

The County relied upon the latter case and also upon *Quaker City Cab Co. v. Pennsylvania,* 277 U. S. 389, 72 L. Ed. 927.

We recognized that under many circumstances the classification of corporations is proper but only where there is some relationship between the corporation form of doing business and the subject matter of the legislation. Under the authority of the cases just cited it was and is our position that it is unconstitutional to give a business advantage to telephone and telegraph corporations, and such corporations alone, merely because they are telephone and telegraph corporations and where it is not an integral part of a general statute for the regulation of an industry for the public good.

In the opening statement contained in "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm" appellee apparently suggests that this Federal constitutional objection was raised too late. However, it was raised before the case was first decided by the State Supreme Court and the opinion of that Court discusses the question at length both in the majority and dissenting opinion and decides such question. (See opinion in Appendix to this Brief.) Consequently under the decisions of this Honorable Court the question was properly raised.

Mallinckrodt Chemical Works v. Missouri ex rel. Jones, 238 U. S. 41, 59 L. Ed. 1192;

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Chambers v. Baltimore & O. R. Co., 207 U. S. 142, 52 L. Ed. 143;

Sully v. American Nat. Bank, 178 U. S. 289, 44 L. Ed. 1072;

Meidreich v. Lauenstein, 232 U. S. 236, 58 L. Ed. 584.

We are now confronted with a motion to dismiss on the following grounds:

1. The County of Los Angeles being a political subdivision of the State has no standing to challenge the validity of section 536 of the Civil Code, which was raised as a defense by the telephone corporation.

2. The County is not a member of the class discriminated against and thus cannot assail the validity of the statute raised by the telephone corporation as a defense.

3. The County has not proved an actual injury and therefore the constitutionality of section 536 must be presumed.

4. The Federal question raised by the County, to wit, that Civil Code section 536 is a nullity, is unsubstantial.

5. The decision of the Supreme Court of the State of California rests upon adequate non-federal grounds.

We shall consider these grounds in the same order.

Point I.

It Is Not the Theory of Our Case That the County Is Within the Protection of the 14th Amendment

We are seeking neither to have overruled nor to have distinguished the decisions holding that a political subdivision is not protected as against the State by the provisions of the 14th Amendment. We are not contending that there has been any discrimination against the County of Los Angeles. We are contending that section 536 of the Civil Code of California does discriminate against all persons, partnerships and associations doing a telephone business other than telephone and telegraph corporations and also that said section discriminates against all corporations, which are required to obtain franchises, other than telephone and telegraph corporations. Such persons, partnerships, associations and corporations are protected by the first section of the 14th Amendment and such discrimination has rendered the section unconstitutional and a nullity.

We fully recognize that our lawsuit must stand or fall depending upon whether or not under the facts of this case the County is in a position to assert the invalidity of the statute because it violates the constitutional rights of others. That, rather than appellee's first ground, is the crucial issue which we are prepared to meet and will meet in our next point.

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Point II.

Recognizing the General and Long Established Rule That a Person in the Favored Class May Not Assert Discrimination Against Others to Defeat a Statute, Our Position Is That the County Is Not Within the Scope of That Rule Under the Circumstances of This Case and That in Any Event It Is Within a Recognized Exception Thereto.

The general rule is usually phrased broadly as stated by appellee, to wit, that

> "No one can assail the validity of a statute on the ground that it impairs the constitutional rights of others."

However, it is significant that in the cases cited by appellee and in most cases involving the general rule it has been a person in the "favored" class who has attempted to invoke the protection of the Constitution. The typical situation is one in which a statute imposes a burden upon many but an even greater burden upon a few and hence one of the many, even though favored, seeks to upset the statute to avoid such burden.

Many sound reasons suggest themselves why such a favored person should not be heard to champion the cause of the remaining few. For example, the many may constitute by themselves a complete and valid class and hence striking the portion of the statute relating to the few still leaves a valid statute embracing a complete class of persons properly subject to its burdens.

For example also, if, as and when the discriminated few appear before the Court to state their grievance the Court may by judicial construction limit the burden on the few to that placed upon the many.

However, the present situation is unusual in several respects:

First. The favored group in the present instance are truly favored through an outright gift of public property, which gift our State Court has held is not prohibited by our State Constitution, and it is not the usual case where the favored group is favored merely because a lesser burden is imposed thereon.

Second. In the usual case the favored group are attempting *to attack the statute* despite the favoritism, whereas, here it is the favored group who are attempting *to assert the statute* as an affirmative defense to a lawsuit. If the rule applies here it applies not as a limitation on the favored group (the usual situation) but results in giving such favored group the affirmative right to obtain benefits from an unconstitutional law.

Third. The favored group do not constitute a complete and valid classification (see our Point IV) and hence it is impossible to segregate the favored group from the discriminated group and hold that the statute is valid as to the former whatever may be the ultimate decision with respect to the latter.

Fourth. As previously indicated, one of the justifications for the general rule is that if the discriminated

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class were actually before the Court the Court might by judicial construction so limit the statute that there would be no excess burden. Because of the peculiar nature of the present statute that is not possible here. The statute does not affirmatively place a burden upon the discriminated class but simply refrains from mentioning any persons other than telephone and telegraph corporations in giving the benefit of a free franchise. Since it is impossible by judicial construction to add something to a statute (as distinguished from striking out or limiting an invalid portion of a statute) it is impossible in this situation to equalize the rights of all parties by judicial construction even if the discriminated class could state a cause of action and get before a court.

Fifth. The discriminated group in the present instance would not obtain the benefits of the favored class even if the statute were struck down. Whether the statute be valid or invalid such group obtains no gift of a free franchise and consequently there is no way that the discriminated group may state a cause of action, obtain a judicial decision and correct the evil.

Sixth. Because the discriminated group are not in a position to state a cause of action against the statute it follows that unless other parties affected by the legislation (as distinguished from those affected by the discrimination) are permitted to raise the Federal question no one can raise the point and the favored group not only may enjoy the fruits of an unconstitutional statute but may affirmatively assert the uncon-

stitutional statute and may use the courts (as they have in this case) to protect them in such unconstitutional privileges. Such an application of the rule under the situation of this case is to place the favored group not only above the Constitution but also above the courts, the courts being powerless to prevent even an affirmative reliance upon the unconstitutional law.

Seventh. The County is not in the favored class (the usual situation where the rule is involved) but is in a class vitally affected by the legislation to its financial detriment, it not being able to receive substantial franchise payments from this favored group.

All of the foregoing suggests that, since the rule is obviously not intended to absolutely prevent judicial review of a constitutional question but merely to assure that it be presented in a proper manner by proper parties, the rule itself should cease when the reason for the rule ceases. We believe that our more limited statement of the rule, to wit, that those in the favored class may not assert the rights of the discriminated class, more nearly conforms to its true intent. The County, not being in the favored class but being in a class adversely affected by the legislation, should therefore not be barred from raising the constitutional question.

Whether we say that the rule itself is limited or whether we accept the broad statement of the rule and recognize necessary exceptions thereto, the result is the same. The California courts in approaching the prob-

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lem have stated the rule broadly but have recognized an exception which covers the present case. The United States Supreme Court has held that under certain circumstances the rule itself does not bar a person who is adversely affected by the legislation although not in the discriminated class. We shall now consider such rules and decisions.

Under the decisions of the State of California the County was a proper party to present this issue in the State Court. California recognizes an exception to the general rule and permits one adversely affected by the legislation to raise the point when it is impossible for one in the discriminated class to raise it.

> *Quong Ham Wah Co. v. Industrial Acc. Com.*, 184 Cal. 26;
>
> *Pac. Indemnity Co. v. Myers*, 211 Cal. 635;
>
> *Van Camp Seafood Co., Inc., v. Newbert*, 76 Cal. App. 445.

This exception is described in *11 Am. Jur.*, page 760, under the subject of Constitutional Law, section 114, as follows:

> "The general rule that a statute purporting to make unconstitutional discrimination between persons or classes of persons cannot be assailed on the ground of unconstitutionality by a person not belonging to the class discriminated against, is subject to well-defined exceptions where contingencies culminate in a grievance against persons not originally within the contemplation of the statute. Un-

> der this view it has been held in one jurisdiction that where no member of a class alleged to be unlawfully discriminated against by a statute is in a position to raise a constitutional question, then any person affected by the application of the statute can urge its unconstitutionality, for the right to attack a statute void for discrimination is not considered to be confined to persons injured by the discrimination, but under some circumstances may be available to those injured by the legislation, even though they are not members of the unfavored class under the statute."

This Honorable Court has likewise permitted a person not in the discriminated class to raise the point where circumstances made it necessary for him to do so to protect his property rights.

Buchanan v. Warley, 245 U. S. 60, 62 L. Ed. 149. In that case it was stated at page 72 as follows:

> "The property here involved was sold by the plaintiff in error, a white man, on the terms stated, to a colored man; the action for specific performance was entertained in the court below, and in both courts the plaintiff's right to have the contract enforced was denied solely because of the effect of the ordinance making it illegal for a colored person to occupy the lot sold. But for the ordinance the state courts would have enforced the contract, and the defendant would have been compelled to pay the purchase price and take a conveyance of the premises. The right of the plaintiff in error to sell his property was directly involved

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and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property, and had obligated himself to take it. This case does not come within the class wherein this court has held that where one seeks to avoid the enforcement of the law or ordinance, he must present a grievance of his own, and not rest the attack upon the alleged violation of another's rights. In this case the property rights of the plaintiff in error are directly and necessarily involved."

We submit that the unusual facts presented by the case at bar likewise justify either invoking such an exception or justify limiting the general rule itself so that it does not embrace those situations where the reason for the rule has ceased. Otherwise we submit that the rule as sought to be applied by appellee would forever prevent any decision upon this constitutional question (since the persons in the discriminated class can state no cause of action) and would forever result in the courts' protecting them in the enjoyment of an unconstitutional privilege.

Point III.

The Discrimination Is Not Conjectural and Hypothetical and the Injury Is Substantial

The appellee telephone corporation asserts that there is nothing in the record to show any injury whatsoever and hence that any injury upon which we might seek to rely is conjectural and hypothetical.

That there is injury to appellant is evident from the fact that appellee is using all of the roads of the County without charge, whereas but for section 536 Civil Code of California the appellant County would collect 2% of the gross receipts under the Franchise Sales Law (Stats. 1905, page 777, as amended, commonly known as the Broughton Act.) Because of section 536 Civil Code of the State of California telephone and telegraph corporations are permitted to use without charge not only the highways of this County but the highways in every county in the State of California. Such highways although provided at the expense of the taxpayers are being diverted to the use of telephone corporations, their stockholders and subscribers. But for this statute the taxpayers of the various counties would be enabled to obtain a substantial reimbursement of their investment. Because of this statute and because of this lost franchise revenue the taxpayers must be subjected to a correspondingly increased tax burden. The damage, therefore, is substantial and continuing and, unless the statute is declared a nullity, is perpetual.

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That there is injury to the discriminated class is shown by the fact that they must pay such 2% of the gross receipts (an obviously substantial amount), whereas telephone and telegraph corporations do not.

What appellee apparently has reference to is that the record does not show how many persons there are so discriminated against. Appellee therefore assumes that for the purpose of this case there are no persons in the discriminated class.

However, it is well established that in passing upon problems of discrimination the Court may consider those things which may be judicially noticed. In *Weaver v. Palmer Bros.*, 270 U. S. 402, 70 L. Ed. 654, this Court said, at page 410:

> "Invalidity may be shown by things which will be judicially noticed (Quong Wing v. Kirkendall, 223 U. S. 59, 65; 56 L. Ed. 350, 352; 32 Supreme Court Rep. 192), or by facts established by evidence."

In the case of *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 78 L. Ed. 413, (involving the emergency Mortgage Moratorium Law of 1933) the Court took judicial notice of the general facts concerning the economic status of the nation in answer to an attack under the due process and equal protection clauses.

In applying these principles to the case at bar it is matter of common knowledge and hence may be judicially noticed that public utility corporations such as electric lighting and power companies, water compa-

nies, gas companies and other companies rendering service to the public all use the public streets for the purpose of laying and maintaining their lines and distributing their products and services. Such public utilities whether incorporated or not are required to pay 2% of the gross annual receipts arising from the use, occupation or possession of such franchises pursuant to the Franchise Sales Law (Stats. 1905, page 777, as amended, commonly known as the Broughton Act). Likewise, all natural persons and partnerships who are operating telephone and telegraph lines (such as unincorporated mutual telephone companies and business concerns running telegraph and telephone lines between their main offices and branch offices) must obtain franchises and pay for such privilege. There is therefore a substantial injury to a substantial class.

Appellee under this point asserts not only that we must prove actual and not hypothetical injury but also asserts that we must negative every conceivable basis which might support the legislative classification. Whether or not the classification is proper is the subject matter of our next point and will be discussed there. For the present we merely wish to point out that the rule is not as harsh as stated by appellee and it is not always assumed in the absence of proof that reasons exist for a classification made by the legislature. As was stated by this Court in *Colgate v. Harvey*, 296 U. S. 404, at 425, 80 L. Ed. 299:

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> "To assume that some unnamed public interest exists, which will sustain the discrimination, does not help the matter here; because the assumption can rest only on surmise, with nothing concrete or explicit appearing to support it or to indicate a legislative intent to relate the exemption to any public purpose."

In our next point we shall consider the problem whether or not the classification contained in section 536 of the Civil Code of the State of California is related to the purpose or object of the legislation or whether it is simply an arbitrary selection of a particular type of corporation for the sole purpose of granting such favored corporation a special benefit.

Point IV.

The Federal Question Is Substantial. Appellant County's Position Is in Accord With the Decisions of This Court Whereas the Appellee's Position and the Holding of the State Court Is in Accord Only With the Dissenting Opinion in Frost v. Corporation Commission, 278 U. S. 515, 73 L. Ed. 483. The Judgment Appealed From Fails to Give Due Consideration to the Requirement That There Be a Relationship Between the Classification and the Subject Matter of the Legislation.

At no time in this lawsuit have we ever questioned the basic premise of appellee that it is entirely proper to classify corporations for many purposes and in many types of statutes.

What we have asserted is that such classification like any classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Frost v. Corporation Commission,* 278 U. S. 515, at 524, 73 L. Ed. 483.

That essential "relation to the object of the legislation" has been substantially ignored by appellee, by the majority opinion of our State Court in the present case, and in the dissenting opinion in *Frost v. Corporation Commission,* 278 U. S. 515, 73 L. Ed. 483. And now appellee (although stating that the State Court distinguished the Frost case) boldly asserts on page 10 of its present motion:

> "The dissenting opinion of Justice Brandeis in that case, concurred in by Justice Holmes and Stone, is undoubtedly, as the cases above show, the established rule of this Court."

By that statement appellee has now very frankly defined the issue presently before this Court both with respect to this motion to dismiss and with respect to the merits. Appellee concedes and indeed asserts that it stands on the dissenting opinion in the Frost case and that such dissenting opinion is the established rule. We assert that the majority opinion in that case is the law.

With respect to the motion to dismiss, the mere fact that appellee finds it necessary to rely upon a dissenting opinion of this Court and in effect to ask this Court to overrule the case demonstrates that the Federal

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question is substantial, and that is true whether the decision sought to be overruled be right or wrong.

With respect to the merits, the fact that the majority opinion in the Frost case does give effect to the essential requirement that the classification must bear a "relation to the object of the legislation" whereas the dissenting opinion does not give proper consideration to that factor we believe supports our position completely.

The other cases cited by appellee are not inconsistent with the majority decision in the Frost case and are not in accord with the dissent. They upheld the classification of corporations and the Frost case did not but the essential difference between the two lines of cases is that in the cases upholding the classification there was the necessary relationship between classification and subject matter of the legislation whereas in cases like the Frost case there was not. Only two of the cases cited by appellee are subsequent to the decision in the Frost case. The other prior cases obviously did not overrule or modify the established rule of that case. Neither of the two subsequent cases (*Lawrence v. State Tax Commission,* 286 U. S. 276, 76 L. Ed. 1102; *Phillips Petroleum Co. v. Jenkins,* 297 U. S. 629, 80 L. Ed. 943) purport to modify or overrule the Frost case. In fact, the first of those cases, *Lawrence v. State Tax Commission,* 286 U. S. 276, at pages 283 to 284, spent considerable time recognizing the rule and demonstrating that a relationship did exist in that case between the classification and the subject matter of the

legislation. It is an income tax case. The supposed discrimination was in failing to tax corporate income on out of State business but the Court pointed out the State policy embodied in the general statute to avoid duplication of tax on corporate income and stockholders' dividends, and since the latter was taxed it was logical and consistent and produced substantial equality to exempt the former. There was a relationship between the corporate form of doing business and the object of the legislation which not only substantially eliminated discrimination but which made necessary and hence justified the classification. Because of this relationship this Honorable Court expressly distinguished (and did not overrule) *Quaker City Cab Co. v. Pennsylvania,* 277 U. S. 389, 72 L. Ed. 927, the other case upon which we rely, and which arrived at the same conclusion as the Frost case. We thus see no justification in the suggestion made by appellee that the cases upon which it relies show that the dissenting opinion in the Frost case "is undoubtedly, as the cases above cited show, the established rule of this Court."

We submit that the holdings of this Honorable Court are consistent. None of them holds that classification is always proper. They require the establishment of relationship between class and subject matter. The end results differ depending upon whether that relationship exists. Where such a relationship exists the classification is upheld. In *Frost v. Corporation Commission,* 278 U. S. 515, 73 L. Ed. 483, it did not exist and the statute was struck down. Likewise, in *Quaker City Cab Co. v. Pennsylvania,* 277 U. S. 389,

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72 L. Ed. 927, the relationship did not exist and the statute was struck down.

An examination of the reasons given by this Honorable Court for its conclusions in the latter two cases will demonstrate that it was not applying different rules but the same rules to different facts. In *Frost v. Corporation Commission,* 278 U. S. 515, 73 L. Ed. 483, the Court said, at page 524:

> "The converse, of course, is equally true. A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case, the classification, in order to be valid, 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 415, 64 L. Ed. 989, 990, 40 Sup. Ct. Rep. 560; Air-way Electric Appliance Corp. v. Day, 266 U. S. 71, 85, 69 L. Ed. 169, 177, 45 Sup. Ct. Rep. 12; Schlesinger v. Wisconsin, 270 U. S. 230, 240, 70 L. Ed. 557, 564, 43 A. L. R. 1224, 46 Sup. Ct. Rep. 260. That is to say, mere difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . .
>
> "Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here

construed and applied, boldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits. That is to say, it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation."

In *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927, this Court said, at page 402:

" . . . The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. Power Mfg. Co. v. Saunders, supra. No decision of this court gives support to such a classification. In no view can it be held to have more than an arbitrary basis. As construed and applied by the state court in this case, the section violates the equal protection clause of the 14th Amendment."

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In one case the statute attempted to give a business advantage and in the other case to impose a burden upon certain types of corporations merely because they were such corporations. They were not statutes which required different treatment of corporations because of inherent differences in that form of doing business or which were enacted to promote some public purpose related to the police power wherein and as an incident thereto it became desirable to limit the conduct of certain functions to certain State-regulated corporations.

Precisely the same thing is true here. Section 536 Code of Civil Procedure of the State of California does not purport to regulate the telephone business by limiting the engagement therein to corporations. All persons are permitted to engage in the telephone business and all are subject to precisely the same regulations. So far as section 536 Civil Code is concerned there is no regulation of the telephone industry whatsoever. All that the section does is to grant a subsidy to all those who happen to be telephone or telegraph corporations. Other persons engaged in the telephone or telegraph business must obtain the usual franchise and pay the usual substantial fees. Other corporations engaged in other utility businesses must obtain the usual franchises and pay the usual fees. There is no rational relationship between the privilege granted to telephone and telegraph corporations and the subject matter of the legislation. It is the situation which was before this Honorable Court in the Frost case. In the Frost case the discriminated class had to obtain a certificate of public convenience and necessity. Here

the discriminated class must obtain franchises under competitive bidding and in addition must pay 2% of their gross receipts.

We rely upon the Frost case.

Appellee relies upon the dissenting opinion in the Frost case and says that it is the established rule of this Court.

We submit that that presents a substantial Federal question sufficient at least to withstand the motion to dismiss and in our opinion sufficient to require the reversal of this case when it is considered on the merits.

Point V.

The Decision May Not Be Rested on Non-Federal Grounds

It is quite true that the State Court considered several State grounds of constitutionality and statutory construction and decided them against the appellant. However, it is the adverse decision upon such grounds which makes the Federal ground material. That is to say, if the State Court had decided that section 536 Civil Code of the State of California violated the State Constitution or had been repealed or had not granted a franchise to telephone corporations it would have been unnecessary to pass upon the Federal question. Having decided that the section was otherwise valid it was necessary to and the State Supreme Court did pass upon whether the section violated the 14th Amendment.

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There was no independent State ground of decision passed upon by the State Supreme Court which made the decision on the Federal ground unnecessary. Appellee asserts that there were two, (1) rule of property, and (2) estoppel.

With respect to the rule of property there is a two-fold answer:

First, the State Supreme Court did not rule that appellant was barred by a rule of property, but referred to one of the arguments "as something akin to a rule of property."

Second, such argument had reference to unconstitutionality under the State Constitution. It is now immaterial whether the statute does not violate our State Constitution because of prior decisions ("something akin to a rule of property") or because of the present decision of the State Supreme Court. It is because the section does not violate the State Constitution (either because of prior decisions or otherwise) that it becomes necessary to consider the Federal constitutional question. The State Court decision cannot be construed as holding that appellee was protected by a prior interpretation of the Federal Constitution, which prior interpretation constituted a rule of property. Section 536 Civil Code of the State of California had never before been challenged under the 14th Amendment in the Supreme Court of the United States or in the Supreme Court of the State of California.

With respect to estoppel appellee does not even contend in its motion to dismiss or affirm that the State Supreme Court rested its decision upon any such ground but merely asserts that the State Supreme Court in its opinion "recited the facts" considered by the trial court with reference to this defense.

It is well established that this Honorable Court will not "refuse jurisdiction because the State Court might have based its decision, consistently with the record upon the independent and adequate non-federal ground." *Indiana ex rel. Anderson v. Brand,* 303 U. S. 95, at 98, 82 L. Ed. 685.

With reference to both asserted independent State grounds of decision not only did the State Supreme Court not rest its decision upon any such grounds in the body of its opinion but we have that Court's own statement of what was before it and what it decided. The third paragraph of the Court's opinion reads as follows:

> "The questions to be decided are: First, what is the effect of section 536? Second, was section 536 repealed by the Broughton Act? Third, if section 536 is construed as granting a franchise to defendant, it is unconstitutional (a) as being a gift in violation of sections 22 and 31 of article IV of the California Constitution or (b) as denying equal protection of the laws and constituting an invalid grant of special privileges in violation of the 14th Amendment to the Federal Constitution and sections 11 and 21 of article I and section 25 of article IV of the California Constitution."

We submit that the State grounds actually passed upon are not indeperdent grounds of decision making it unnecessary to pass upon the Federal question, but upon the contrary, it is because those grounds were decided adversely to appellant and the statute was thus subsisting and valid under our State Constitution that it became necessary to decide whether or not the statute was nevertheless invalid because it violated the 14th Amendment of the Federal Constitution.

Conclusion

We respectfully submit that the motion to dismiss or affirm should be denied. If this case is not determined on the merits, a statute which gives telephone and telegraph corporations a special privelege will be perpetuated at the taxpayers' expense. It is a most important public question affecting the revenue of all the counties of this State.

Respectfully submitted,

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and
A. CURTIS SMITH,
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and
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Attorneys for Appellant.

APPENDIX

FINAL OPINION, AS MODIFIED ON REHEARING, IN THE SUPREME COURT OF THE STATE OF CALIFORNIA EN BANC

THE COUNTY OF LOS ANGELES, a body politic and corporate, Appellant, vs. SOUTHERN CALIFORNIA TELEPHONE COMPANY, a corporation, Respondent.	)	FILED: L. A. No. 19311

GIBSON, C. J.—By this action for an injunction, plaintiff county is seeking to compel defendant telephone company to obtain a county franchise and to pay for the privilege of maintaining its lines and poles on streets and highways outside of incorporated areas. Defendant claims it was granted this privilege by section 536 of the Civil Code as amended in 1905, and that it is not required to obtain a franchise from the county. The trial court determined that defendant had a valid franchise, from the state, and denied the injunction. The county has appealed from the judgment.

In the years 1903-1905, the county issued five franchises for telephone lines, and these were there-

after conveyed to the defendant telephone company. Three of the franchises terminated before this action was commenced, and a fourth expired before the trial. The fifth franchise by its terms is still in effect, but the area which it covers was expressly excluded from this controversy by the complaint. Only one of the franchises required the payment of a percentage of the gross receipts derived from the use of the privilege, and the company made the payments, as provided, until expiration of the period specified therein. The company and its predecessors, at least since 1909, have specifically relied on section 536 for their authority when applying for permits to locate or change poles or lines on the highway. Further, from 1905 until about the time of the filing of the complaint, except for six years, the county assessed and levied property taxes on the franchise claimed by defendant and its predecessors under the section.

The questions to be decided are: First, what is the effect of section 536? Second, was section 536 repealed by the Broughton Act? Third, if section 536 is construed as granting a franchise to defendant, it is unconstitutional (a) as being a gift in violation of sections 22 and 31 of article IV of the California Constitution or (b) as denying equal protection of the laws and constituting an invalid grant of special privileges in violation of the 14th Amendment to the federal Constitution and sections 11 and 21 of article I and section 25 of article IV of the California Constitution.

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(1) Section 536 was originally enacted at the time of the adoption of the codes in 1872, but similar provisions had existed for many years prior thereto. (See Stats. 1850, p. 369; Stats. 1857, p. 171). When first enacted the section applied only to telegraph corporations. It made no mention of *telephone* companies, and it did not grant any rights to such companies prior to 1905, when the section was repealed and reenacted to apply to both telegraph and telephone corporations. (See *Sunset Tel. & Tel. Co. v. Pasadena,* 161 Cal. 265, 118 P. 796.) As applied to *telegraph* companies, it has been held that section 536, as it existed prior to 1905, was effectual to grant a state franchise, and that the use of the highways, and the maintenance and operation of the telegraph system, constituted an acceptance of the provisions of the statute and resulted in a contract between the company and the state which was secured by the federal Constitution against impairment by subsequent state legislation. (See *Western Union Tel. Co. v. Hopkins,* 160 Cal. 744, 87 P. 1023; *Postal Tel. Cable Co. v. Los Angeles,* 160 Cal. 129, 116 P. 566; *Sunset Tel. & Tel. Co. v. Pomona,* 172 F. 829, 837; *Postal Tel. Cable Co. v. Railroad Com.,* 200 Cal. 463, 254 P. 258).

The purpose of the change in 1905 was to add *telephone corporations* to the section, and, except for this extension, there is nothing in the amendment to indicate any intention to alter the effect and operation of the statute. (See *City of Salinas v. Pacific Tel. & Tel. Co.,* 72 Cal. App. 2d 494, 497, 164 P. 2d 905).

In view of the construction given to this section as it existed prior to 1905, and the absence of other changes, it must be held that the intention was to offer the grant of a franchise to telephone as well as telegraph companies upon acceptance by the construction and operation of communication facilities.

(2) A question has arisen, however, as to whether section 536 was repealed by the Broughton Act, which was adopted at the same session at which section 536 was amended. The act does not contain any provision expressly repealing that section, and it was not repealed by implication unless the statutes are so repugnant they cannot stand together. The Legislature was considering the statutes at the same time and must have intended to give effect to both. In *County of Inyo v. Hess,* 53 Cal. App. 415, 200 P. 373, it was held that section 536 was not repealed by the Broughton Act but that the statutes could operate in separate fields. The court said at page 425 "that under and by virtue of the provisions of section 536 of the Civil Code, telephone corporations are granted the right and privilege to use the public highways over which to construct and operate lines of telephone wires, free from any grant made by subordinate legislative bodies, and unrestricted by the provisions of the Broughton Act . . ." The court also declared that section 536 was intended as a legislative grant limited in operation to telegraph and telephone *corporations,* as distinguished from *individuals.* This construction is supported by the specific terms of the section which refers only to "telegraph or telephone corporations."

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The Broughton Act, unlike section 536, does not grant any right or privilege, nor does it purport to empower or authorize boards of supervisors to grant franchises or other privileges, but instead indicates an intent to limit and restrict the powers which may have been granted under other laws by specifying the procedure which must be followed and the conditions which must be imposed in the granting of any franchise by subordinate legislative bodies. The court stated in *Oro Electric Corp. v. Railroad Com.*, 169 Cal. 466, at pages 482-483, (147 P. 118), that "this act merely places restrictions upon the granting of franchises, where the power to grant such franchises exists otherwise. As was said in *Sunset Tel. & Tel. Co. v. Pasadena,* 161 Cal. 265, 272, (116 P. 796), the 'whole purpose' of the act 'was to prescribe the method and conditions upon which the franchises included within its terms might be granted by the legislative body authorized by law to make the grant.' The act does not authorize any board or council to grant a franchise." (See also *McGinnis v. Mayor and Common Council,* 153 Cal. 711, 713-714, 96 P. 367; *City of San Diego v. Kerckhoff,* 49 Cal. App. 473, 482 (193 P. 801). Since the Broughton Act is thus limited in operation to those franchises which subordinate legislative bodies are authorized to grant under other laws, it cannot be construed as applicable to statutory franchises which are not granted by such bodies but which, as in the case of the franchise involved here, are granted directly by the legislature. The two statutes

were enacted for separate purposes and occupy separate fields, and both can be given effect. There is, therefore, no such repugnance between the acts as would require a determination that there was any implied repeal. Accordingly, defendant is entitled to use the streets and highways in unincorporated areas of the county, by reason of its franchise under section 536, unless that section, as claimed, is unconstitutional.

The county contends that the Legislature is prohibited by sections 22 and 31 of article IV of the California Constitution from granting a free franchise and that since no compensation is required to be paid for the rights acquired under section 536, the statute is unconstitutional. It does not follow, however, that because telephone and telegraph companies are permitted without charge to construct lines along the highways the privilege granted is a gift. The franchise is conditioned not only on the establishment of lines by a telegraph or telephone corporation, but also, by necessary implication, on the continued operation of the system. (4) The grant under section 536 must be construed in favor of the state. (Civ. Code, Sec. 1069). As so construed it must be held to be a grant to use public roads and highways so long as telegraph or telephone communication service is continued and that the acceptance of the franchise involves an assumption of the duty to furnish proper and adequate communication service to the public. Obviously, the state receives a substantial benefit from the continued operation of such a system, and the question is whether,

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notwithstanding that benefit, the grant comes within the constitutional prohibition.

(5) Section 536 has been judicially construed by many decisions of this court, and it has been uniformly held that the statute is a continuing offer extended to telephone and telegraph companies to use the highways, which offer when accepted by the construction and maintenance of lines constitutes a binding contract based on adequate consideration, and that the vested right established thereby cannot be impaired by subsequent acts of the Legislature. (*Western Union Tel. Co. v. City of Visalia*, 149 Cal. 744 (87 P. 1023); *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106 (116 P. 557); *Western Union Tel. Co. v. County of Los Angeles*, 160 Cal. 124 (116 P. 564); *Postal-Telegraph Cable Co. v. County of Los Angeles*, 160 Cal. 129 (166 P. 566); *Postal Telegraph Cable Co. v. Los Angeles*, 164 Cal. 156 (128 P. 19); *Sunset Tel. & Tel. Co. v. Pasadena, 161 Cal.* 265 (118 P. 796); *Postal-Telegraph Cable Co. v. Railroad Com.*, 200 Cal. 463 (254 P. 258); see *People v. Turlock Home Tel. & Tel. Co.*, 200 Cal. 546 (253 P. 1108); *County of Inyo v. Hess*, 53 Cal. App. 415 (200 P. 373); *State of California v. Marin Mun. W. Dist.*, 17 Cal. 2d 699 (111 P. 2d 651).

The nature of the rights and privileges arising from section 536, as interpreted by the cases just cited, is stated in *Postal-Telegraph Cable Co. v. Railroad Com.*, 200 Cal. 463, at pages 472-473 (254 P. 258) as follows: "This section (536) constitutes a grant of a franchise

which the state offered, and petitioner accepted by the construction of its lines. The rights acquired by the Telegraph Company, by accepting and availing itself of the provisions of the section, are vested rights which the constitutions, both state and federal, protect. They cannot be taken away by the state, even though the legislature should repeal the section, or by the people through a constitutional provision. . . . The finding of the respondent Commission of the physical fact that petitioner was maintaining and operating its lines of telegraph over the roads and highways of the state establishes, as a matter of law and fact, the proposition that it has accepted and owns a state franchise for that purpose, which was offered to it by section 536, *supra*. . . . The grant, resulting from the acceptance of the state offer, constituted a contract between the Telegraph Company and the state, secured by the constitution of the United States against impairment by any state legislation." (See also *City of Beverly Hills v. Los Angeles,* 175 Cal. 311 (165 P. 924).

The prevalence of legislative grants to public utilities of the privileges of using streets and highways is shown by the following statement in *State of California v. Marin Mun. W. District,* 17 Cal. 2d 699, 703 (111 P. 2d 651): "The right obtained by defendant from these sources is a right conferred by the legislature to construct and operate pipe lines along the public highways of the state. Such a grant by the state to a public utility . . . has always been considered a franchise by the courts of this state. The right granted

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to municipal corporations by the statute of 1923 to use the public highways was held a franchise in *Los Angeles v. South Gate,* 108 Cal. App. 398 (291 P. 654). The right granted to public utilities by article XI, section 19 of the . . . Constitution . . . was held a franchise in *San Jose Gas Co. v. January,* 57 Cal. 614. . . . The right granted to telephone and telegraph companies by . . . section 536 (Civ. Code) . . . was held a franchise in *Western Union Tel. Co. v. Hopkins,* 160 Cal. 106 (116 P. 557); *Sunset Tel. & Tel Co. v. Pasadena,* 161 Cal. 265 (118 P. 796), and *Postal-Telegraph Cable Co. v. Los Angeles,* 164 Cal. 156 (128 P. 19). The right granted to irrigation districts by a 1923 statute . . . for power lines was held a franchise in *Winkie v. Turlock Irr. Dist.,* 24 Cal. App. 2d 1 (74 P. 2d 302)."

The courts of other jurisdictions have held that the statutory offer of a franchise when accepted by the construction and operation of a public utility results in a valid contract secured by the federal Constitution against impairment. *(New York Electric Lines Co. v. Empire Subway Co.,* 235 U. S. 179, 193 (35 S. Ct. 72, 59 L. Ed. 184); *City Railway Co. v. Citizens' Street Railroad Co.,* 166 U. S. 557, 567 (17 S. Ct. 653, 41 L. Ed. 1114); *Chicago Gen. Ry. Co. v. City of Chicago,* 176 Ill. 253, 259 (52 N. E. 880, 68 Am. St. Rep. 188, 66 L. R. A. 959); see *State v. Southwestern Bell Telephone Co.,* 338 Mo. 617 (92 S. W. 2d 612); *Arkansas State H. Com'n. v. Southwestern Bell T. Co.,* 206 Ark. 1099 (178 S. W. 2d 1002).).

The county seeks to avoid the effect of the long line of cases holding that the acceptance of the offer contained in section 536 and similar statutes resulted in a valid contract by asserting that those cases did not take into consideration the constitutional prohibition against gifts of public property and its historical background. It is argued that sections 22 and 31 of article IV of the state Constitution were enacted to prevent the waste of public funds and property by the appropriation of subsidies to railroads and other corporations, and that the privilege of using the highways for telephone lines is, in effect, a subsidy to a corporation operated for private profit. Although none of the opinions of this court construing section 536 discussed the possible effect of sections 22 and 31 of article IV, it would seem unlikely that the many judges and counsel participating in those cases entirely overlooked the legality of the consideration involved, since that was an essential requisite in each case to the holding that the acceptance of the offer of a franchise resulted in a valid contract.

In support of its contention that a public benefit cannot be a valid consideration for the grant of a limited privilege to use the highways for the construction and maintenance of telephone lines, the county relies upon the case of *Higgins v. San Diego Water Co.*, 118 Cal. 524 (45 P. 824, 50 P. 670), asserting that the consideration involved there is identical with that which must be urged to support the contract in the present case. The City of San Diego subleased from

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defendant water company its distributing system for the term of 20 years at a fixed monthly rental, and the company agreed as part of the consideration that it would construct a railroad line. The agreement was held to be invalid on the ground that the charter of San Diego conferred no authority upon the council to expend any portion of the municipal funds in aiding the building of railroads. The court expressly declined to determine whether the contract violated the constitutional prohibition against gifts, and the decisions therefore is not authority here. There is language in the opinion, however, which intimates that some of the evils which the constitutional restriction was designed to prevent were present in the transaction involved in that case.

Courts in other jurisdictions with similar constitutional prohibitions have held in factual situations comparable to that involved in the Higgins case that the general public benefit derived from the construction of a public utility system is insufficient consideration to support direct appropriations of public money, extensions of public credit, or outright grants of property. *Lord v. Denver,* 58 Colo. 1 (143 P. 284, Ann. Cas. 1916C 893, L. R. A. 1915B 306); *Colorado Central R. R. Co v. Lea,* 5 Colo. 192; *Southern Railway Co. v. Hartshorne,* 162 Ala. 491 (50 So. 139); *Stone v. State,* 223 Ala. 426 (136 So. 727).). On the other hand, the only cases which have considered franchises of the character involved here hold that the grants are valid and do not contravene constitutional prohibitions

against gifts. *(State v. Southwestern Bell Telephone Co.,* 338 Mo. 617 (92 S. W. 2d 612); *State v. Union Electric Co. of Missouri* (Mo. App.), 142 S. W. 2d 1099; *Arkansas State H. Com'n. v. Southwestern Bell T. Co.,* 206 Ark. 1099 (176 S. W. 2d 1002).).

There appears to be some basis for the distinction although it has not been pointed out in the cases. (6) A franchise such as is authorized by section 536 is not an absolute grant in fee or an appropriation of money, but is merely a limited right to use the highways and only to the extent necessary for the furnishing of services to the public. Also, the privilege must be exercised "in such manner and at such points as not to incommode the public use of the road or highway." (Civ. Code, Section 536). It is obvious that the right acquired by the company is of less substance than the transfers involved in the cited cases which condemn appropriations of money and grants in fee.

Moreover, the state is assured of a continuing benefit in return for the privileges granted under section 536, whereas this may not be true in transactions involving an outright appropriation or transfer in fee. The company must not only construct a telephone system but it must render service, and if it fails to do so the franchise terminates. Thus the state receives benefits during the life of the franchise, since in order to retain it the company must continue to serve the public. If and when the public benefit ceases and the franchise expires, the state is in as good a position

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as it was before the limited privilege was granted. The building of a public utility and the consequent benefit to the people may not be a sufficient consideration to support a grant in fee, but it does not follow that the benefit received from the construction and continued operation of a telephone system is not an adequate return for the use of the highways so long as the public service continues.

(7) Since the offer of a franchise in section 536, when accepted, results in a binding agreement supported by a valid consideration, there is no gift within the meaning of the constitutional prohibition.

(8) It is further urged that section 536, insofar as it applies only to corporations and not to individuals, improperly grants special privileges and invalidly discriminates in favor of corporations. It is asserted that the section violates the equal protection clause of the 14th Amendment to the federal Constitution, and also that it is invalid under article I, sections 11 and 21, and article IV, section 25, subdivisions 19 and 33 of the state Constitution.

These provisions of the state and federal Constitutions do not prevent classification by the Legislature, nor do they require that statutes operate uniformly with respect to persons or things which are in fact different. (*People v. Western Fruit Growers*, 22 Cal. 2d 494 (140 P. 2d 13); *McCreery v. McColgan*, 17 Cal. 2d 555 (110 P. 2d 1051, 133 A. L. R. 800); *In re Fuller*, 15 Cal. 2d 425 '102 P. 2d 321); *Bueneman*

v. City of Santa Barbara, 8 Cal. 2d 405 (65 P. 2d 884, 109 A. L. R. 895); *Tigner v. Texas,* 310 U. S. 141 (60 S. Ct. 879, 84 L. Ed. 1124); *Puget Sound Co. v. Seattle,* 291 U. S. 619 (54 S. Ct. 542, 78 L. Ed. 1025); *Radice v. New York,* 264 U. S. 292 (44 S. Ct. 325, 68 L. Ed. 690); *Arkansas Nat. Gas Co. v. Railroad Com.,* 261 U. S. 379 (43 St. Ct. 387, 67 L. Ed. 705).).

The problem presented by the difference in treatment accorded corporations and individuals under section 536 was directly passed upon in *Western Union Tel. Co. v. Hopkins,* 160 Cal. 106 (116 P. 557), and *Postal Tel. Cable Co. v. Los Angeles,* 160 Cal. 129 (116 P. 566), where the claim was made that section 536 was invalid because the offer of a franchise contained therein was limited to corporations. In the Hopkins case the court, in holding that there was no violation of the constitutional provisions relating to special legislation, said (p. 122): "We may reasonably assume that good and sufficient reasons may be apparent to the legislature why the right to exclusively occupy portions of the public highways for the purposes specified should be confined to corporations organized and existing for the purpose of doing a telegraph business, and why such corporations constitute a class to which such a grant may properly be restricted without violating our constitutional provisions against special legislation. If it may reasonably be so assumed the legislation must be upheld, for it is well settled that to warrant a court in adjudging legislation void on this ground it must clearly appear that there was no suf-

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ficient reason to warrant the legislative department in finding a difference and making the discrimination. Every presumption is in favor of the validity of an act of the legislature, until its invalidity is made to appear."

Although the Hopkins case makes no specific reference to the equal protection clause of the 14th Amendment, it is clear that the test for determining the validity of a statute where a claim is made that it unlawfully discriminates against any class is substantially the same under the state prohibitions against special legislation and the equal protection clause of the federal Constitution. *(People v. Western Fruit Growers,* 22 Cal. 2d 494, 506 (140 P. 2d 13); see *McCreery v. McColgan,* 17 Cal. 2d 555 (110 P. 2d 1051, 133 A. L. R. 800); *In re Fuller,* 15 Cal. 2d 425 '102 P. 2d. 321); *Bueneman v. City of Santa Barbara,* 8 Cal. 2d 405 (65 P. 2d 884, 109 A. L. R. 895).) In the Western Fruit Growers case the court, after noting the general rules on this subject, stated: "Problems of classification under the California Constitution are thus similar to those presented by the federal equal protection of the laws clause of the 14th Amendment. Under either provision, the mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be 'actually and palpably unreasonable and arbitrary,'

or the legislative determination as to what is a sufficient distinction to warrant the classification will not be overthrown. (Citations.) When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification." (22 Cal. 2d 494, 506).

It is argued, however, that the portion of the opinion in the Hopkins case dealing with the assertedly invalid distinction between individuals and corporations was dictum for the reason that the telegraph company had commenced business and acquired rights under the Constitution of 1849, which contained no inhibition against special legislation. However, in the companion case of *Postal Tel. Cable Co. v. Los Angeles,* 160 Cal. 129 (116 P. 566), decided at the same time and controlled by the Hopkins decision, the plaintiff company did not commence business or acquire any rights until after the adoption of the Constitution of 1879, and therefore the issue was necessarily before court.

The reasons which may have motivated the enactment of section 536 were not discussed in the Hopkins case, but it must be presumed that the Legislature acted in response to a reasonable basis for classification and that the differentiation was based on adequate grounds if any such basis can reasonably be said to

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exist. There is ample justification for treating corporations differently from individuals in granting franchises for the operation of telephone and telegraph systems, and there is a reasonable basis for the classification of corporations as the sole recipients of the grant offered in section 536. Corporations are in a better position than individuals to finance and carry on statewide projects of this nature, they are more easily regulated and supervised, and they have much greater permanency of existence and can give better assurance of uninterrupted service. It may be that one of the purposes of section 536 was to promote the establishment of statewide communication systems, and the use of corporate ownership and management may have been considered the best method of achieving that purpose.

Statutes similar to section 536, and applying to telephones and telegraphs or to railroads, exist in most of the other states of the Union, but no case has been found in which such a statute was held unconstitutional on the ground of improper discrimination. On the contrary, where the objection has been raised, the power to limit the granting of franchises has been upheld. In *Goddard v. Chicago & N. W. Ry. Co.*, 202 Ill. 362 (66 N. E. 1066), an act provided that a street railroad corporation might use the streets and highways outside of cities and towns with the consent of the county board, but did not authorize such use by individuals. It was held that the Legislature by limiting grants to incorporated companies did not violate the state or

Federal Constitutions. Other courts have held that banking, insurance and similar businesses may be restricted to corporations. (See *Noble State Bank v. Haskell,* 219 U. S. 104 (31 S. Ct. 186, 55 L. Ed. 112; *Shallenberger v. First State Bank,* 219 U. S 114 (31 S. Ct. 189, 55 L. Ed. 117); *Engel v. O'Malley,* 219 U. S. 128 (31 S. Ct. 190, 55 L. Ed. 128); *Dillingham v. McLaughlin,* 264 U. S. 370, 373 (44 S. Ct. 362, 68 L. Ed. 742); *German Alliance Ins. Co. v. Lewis,* 233 U. S. 389, 416 (34 S. Ct. 612, 58 L. Ed. 1011); *Commonwealth v. Vrooman,* 164 Pa. 306 (30 A. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250); *Brady v. Mattern,* 125 Iowa 158 (100 N. W. 358, 106 Am. St. Rep. 291).)

There are general statements in *Frost v. Corporation Com.,* 278 U. S. 515 (40 S. Ct. 235, 73 L. Ed. 483), which, detached from their context, may appear to be out of harmony with the authorities cited above. The case, however, is clearly distinguishable. The legislation condemned in that decision exempted agricultural corporations issuing stock and organized for private gain, as well as true cooperatives, from the requirement of making a showing of public necessity in order to obtain a permit to operate a cotton gin. Individuals and other corporations desiring to engage in the same business for profit were required to make the showing. The corporation involved in the Frost case was an agricultural company issuing stock and organized for private gain. The court intimated that true cooperatives might be properly exempted but held

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that, in view of the subject dealt with by the legislation, there was no substantial or relevant basis for the differentiation between an agricultural corporation of the type there involved and individuals or other corporations organized for profit. The subject involved in the Frost case is entirely different from that dealt with in section 536. As we have seen, there are sound purposes to be served in encouraging the corporate operation of telephone systems, and the classification complained of cannot, therefore, be said to be unreasonable or arbitrary.

(9) The rule that all presumptions are in favor of the validity of statutes and that a classification made by the Legislature will not be overthrown by the courts unless it is palpably unreasonable has added force when, as here, the statute has been accepted as valid for many years, and vast sums have been invested in reliance upon the rights granted. In *Willard v. Glenn-Colusa Irr. Dist.*, 201 Cal. 726 (258) P. 959), where attack was made on the constitutionality of section 55 of the California Irrigation District Act, the court said (pp. 743-744): "It has been upon the statute books of this state for over forty years. While its constitutionality has never been passed upon by this court, this question, so far as our knowledge goes, has never been raised. It is hardly possible that in all the litigation that has been before the courts of this state regarding irrigation districts in their various ramifications, the validity of this provision of the statute would not have been attached had there been any ques-

tion of its constitutionality. The fact that no proceeding prior to the present one has ever been brought before this or any of the appellate courts of this state in which the constitutionality of this provision of the statute has been questioned is most convincing proof that the profession as a whole has regarded its validity unassailable."

Stronger and even more convincing proof may be found in the legal history of section 536. Its provisions relating to telegraph companies have been in existence since 1872, and those applying to telephone companies have been in effect since 1905. The constitutionality of the section has been impliedly upheld by many decisions of this court, and in the few instances where a direct challenge has been made it has withstood the attack. These decisions have been acquiesced in and acted upon for more than 40 years and have become something akin to a rule of property which should not be disturbed in the absence of the most compelling and cogent reasons. We find no such reasons here.

The judgment is affirmed.

Shenk, J., Traynor, J., Schauer, J., and Spence, J., concurred.

Edmonds, J., concurred in the judgment.

CARTER, J.—I dissent.

By permitting section 536 of the Civil Code and the Broughton Act to stand side by side, the majority opinion in effect affirms the holding in *Inyo v. Hess*,

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53 Cal. App. 415 (200 P. 373), that the two statutes have the effect of giving to telephone and telegraph corporations the right to erect and maintain lines along public highways and streets free of any burden whatsoever while every other person or association must comply with a number of regulations and pay money for the same right. Thus the majority perpetuates the type of special privilege conferred upon corporations which is reminiscent of the decade when this legislation was adopted.

In my opinion, this results in a violation of the equal protection clause of the Fourteenth Amendment to the federal Constitution. While it is clear that the equal protection clause does not prevent a state Legislature from enacting statutes which contain a "reasonable classification," it is equally clear that it does prevent the states from enacting laws which create unreasonable discrimination. The majority opinion asserts that the differentiation here involved is a "reasonable classification." To support this argument, eight cases are cited. (*Goddard v. Chicago & N. W. Ry. Co.*, 202 Ill. 362 (66 N. E. 1066); *Noble State Bank v. Haskell*, 219 U. S. 104 (31 S. Ct. 186, 55 L. Ed. 112); *Shallenberger v. First State Bank*, 219 U. S. 114 (31 S. Ct. 189, 55 L. Ed. 117); *Engel v. O'Malley*, 219 U. S. 128 (31 S. Ct. 190, 55 L. Ed. 128); *Dillingham v. McLaughlin*, 264 U. S. 370 (44 S. Ct. 362, 68 L. Ed. 742); *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389 (34 S. Ct. 612, 58 L. Ed. 1011); *Commonwealth v. Vrooman*, 164 Pa.

306 (30 A. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250); *Brady v. Mattern,* 125 Iowa 158 (100 N. W. 358, 106 Am. St. Rep. 291).)

All eight of these cases involved statutes making distinctions between classes of the public. In all eight of the cases, the statutes were upheld as not violative of the Constitution. But the basis of the holdings in seven of the eight cases was that the statutes constituted an exercise of the police power, so-called. This power of the states to make regulations which, while they abridge the rights of some of the citizens, are nevertheless necessary and justified in the interest of the general public, can be invoked only in cases where there is a danger to the general public. A classification may be validly made when it has a reasonable tendency to combat a specific evil. ". . . (t)o justify the imposition of a burden, there must be some connection of causation or responsibility between the person selected or the right impaired and the danger to the public welfare or the public burden which is sought to be avoided or relieved." (Freund, Police Power, 635.) This element of public danger was present in seven of the cases mentioned. In *Nobel State Bank v. Haskell,* 219 U. S. 104 (31 S. Ct. 186, 55 L. Ed 112), the issue was whether anyone desiring to engage in the business of banking could be required to form a corporation, submit to certain inspections and contribute to an insurance or guaranty fund. The evil which this regulation was designed to check was the frequent failure of individuals engaged in the bank-

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ing business to meet their obligations, and the resulting insecurity of commercial paper, especially checks. The Supreme Court of the United States said: "If the . . . legislature declares . . . that incorporation, inspection and the above-described cooperation are *necessary safeguards,* this court certainly cannot say that it is wrong." *(Nobel State Bank v. Haskell, supra.)* (Emphasis added.) *Shallenberger v. First State Bank,* 219 U. S. 114 (31 S. Ct. 189, 55 L. Ed. 117), involved practically the same situation and is based on the same reasons as the Nobel State Bank Case. *Engel v. O'Malley,* 219 U. S. 128 (31 S. Ct. 190, 55 L. Ed. 128), and *Dillingham v. McLaughlin,* 264 U. S. 370 (44 S. Ct. 362, 68 L. Ed. 742), both involved control of a type of business apparently common to New York during the years of heavy immigration. There, individuals would act as depositaries of small savings deposits made by recent immigrants. A substantial number of these depositaries seems to have absconded with the money so deposited and, of course, the low-income, unsophisticated depositors were nearly helpless. To eliminate this danger and still enable this particular group of depositors to make their small deposits, various statutory enactments were passed which subjected these individual depositaries to rather strict regulations but exempted from the operation of the regulations banks duly incorporated. Failure on the part of the depositaries to comply with the regulations, such as putting up a bond and submitting to inspections, was made a misdemeanor. Statutes of this type were therefore

obviously designed to check an evil and if any further test be needed, the criminal character of the statute is the best indication that the protection of the public was at its basis. In *German Alliance Ins. Co. v. Lewis,* 233 U. S. 389 (34 S. Ct. 612, 58 L. Ed. 1011), a statute imposing a number of regulations on insurance companies was attached on the ground that it expressly exempted farmers' cooperative insurance associations from its regulations. The provisions of the statute were regulatory only and it was held that the classification was entirely reasonable because the members of a cooperative farmers' insurance association are in a far better position to police their own organization than members of the public who deal with unincorporated and unregulated insurers.

The next two cases cited are not binding on this court because they were decided by state courts. But they are equally based on the principle of protection of the public so that they are not only not binding but also inapplicable. *Commonwealth v. Vrooman,* 164 Pa. 306 (30 A. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250), was a criminal prosecution under a statute making it a misdemeanor for any person other than a corporation to engage in the insurance business. The decision upholding the distinction is based on the police power and the need of the public for protection. *Brady v. Mattern,* 125 Iowa 158 (100 N. W. 358, 106 Am. St. Rep. 291), was a petition for a writ of habeas corpus by a contractor who had been arrested after violating a statute which placed rather stringent controls on in-

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dividual contractors and required them to put up bonds but exempted corporate contractors and building and loan associations from such controls. The petitioner attached the constitutionality of the discrimination and the court based its refusal to grant the writ on the fact that the protection necessary to safeguard the public made the classification reasonable.

In the case at bar, there is no pretence that the discrimination is in any way designed to protect the general public from the risks involved if it is permitted to deal with unincorporated telephone and telegraph operators. The absence of this element renders section 536 of the Civil Code unconstitutional. It makes a distinction between private persons and partnerships on one side and telephone and telegraph corporations on the other. This distinction would result in a reasonable classification if public welfare were at all involved. Since public welfare is not involved, the distinction results in a discrimination prohibited by the equal protection clause of the Fourteenth Amendment.

The one case cited in the majority opinion which has not been dealt with does seem to state the rule that the policies behind legislation are not open to inquiry by the courts. *Goddard v. Chicago & N. W. Ry. Co.,* 202 Ill. 362 (66 N. E. 1066). In that case the argument was made that legislation which permitted a county board to issue permits for the construction of railroads to corporations only was in violation of the state and federal Constitutions. The court brushed

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this argument aside, saying: "The legislature had power to limit the authority of the county board to grant a license to incorporated companies created . . . for the purpose of constructing and operating street railways, and it is not material what reasons existed for prescribing the limit. It was a case for the exercise of legislative judgment with which we are not concerned. *(Goddard v. Chicago & N. W. Ry. Co., supra.)* It is submitted that the court was clearly wrong in stating this flat rule. The moment a classification or discrimination is created, the question of whether it shall stand or fall is very much the concern of the courts. It is simply not true that the Legislature can exercise unlimited discretion when it creates such classifications. The majority opinion recognizes this and correctly states the rule that discriminatory legislation must fall unless reasonable and non-arbitrary. The Goddard case, in failing to recognize this rule, would therefore fall even under the view taken by the majority. Besides, being a state case it is not binding here and its persuasive force is dissipated by the case of *Frost v. Corporation Com.,* 278 U. S. 515 (49 S. Ct. 235, 73 L. Ed. 483), which controls the Goddard case as well as the case at bar.

The Frost case, supra, shows that the result reached by the majority is wrong. The distinction created by section 536, the Broughton Act and the decision in this case is not a reasonable classification: It is an unreasonable discrimination. The present case falls clearly within the rule of the Frost case as it is much

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stronger on the facts. In the Frost case, a statute required persons and nonagricultural corporations who wished to engage in the ginning of cotton to make a showing of public necessity as a condition precedent to their being able to obtain a license. Cooperative associations were exempt from this requirement. Under the general laws of the state involved, a cooperative association was free to sell its services to the public and make a profit out of such dealings. The court held that the distinction created an unreasonable classification. "... the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, . . . it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation." *(Frost v. Corporation Com., supra,* 522.)

In the case at bar, mere enumeration of some of the requirements set forth in the Broughton Act will show that a greater burden results in this case than that of showing a public necessity in the Frost case. Under the Broughton Act, a bidder for a franchise must—unless he is a telephone or telegraph corporation—submit sealed bids, must make immediate payment of a substantial sum if the franchise is struck off

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to him at the auction, must make an additional large payment within 24 hours, and must pay a tax of 2 per cent on the gross receipts every year. There are other provisions, but those set forth show sufficiently the great disparity created between the privileges enjoyed by corporations under section 536 and those enjoyed by individuals and associations under the Broughton Act.

The classification is unreasonable and discriminatory because nothing is gained through it by anyone including the state, except the corporations which are exempt from the burdens of the Broughton Act. Operators other than those favored few are evidently just as acceptable to the Legislature, provided they pay for the privilege given free to those favored few. Just as in *Frost v. Corporation Com., supra,* both are engaged in exactly the same type of business, for the same purpose. Both would be public utilities. It is obvious, therefore, that no consideration of public welfare could have been in the back of the legislators' minds. No real reason for the classification is shown. The majority opinion indulges in conjecture as to what some of these reasons might have been. That, however, is not a proper solution. The Supreme Court of the United States has laid down the rule that the reasons for the classification must be apparent in order for it to have any chance of being sustained: "To assume that some unnamed public interest exists, which will sustain the discrimination, does not help the matter here; because the assumption can rest only on surmise, with

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nothing concrete or explicit appearing to support it or to indicate a legislative intent to relate the exemption to any public purpose." *(Colgate v. Harvey,* 296 U. S. 404, 425 (56 S. Ct. 252, 80 L. Ed. 299, 102 A. L. R. 54).) The last-cited case involved income tax legislation under which income from investments within the state was favored over that derived from out-of-state investments. The state courts held that such a statute "might" have the purpose of encouraging investments within the state. The Supreme Court answered that contention in the words quoted *supra.* The suppositions made by the majority opinion in the case at bar are open to the same criticism.

Two more points are raised which purportedly lend support to the holding of the majority: One, that the question of constitutionality of these statutes has been before this court and has been decided and that therefore the classification and the subsequent reliance thereon became tantamount to a rule of property which this court should not disturb except for compelling reasons. Literally speaking, the statement that the constitutionality of the combined effect of these statutes has been before this court is true. The statement, however, contains an ambiguous term: "Constitutionality." If this word can be construed to include the state Constitution alone, the statement would be correct. *Western Union Tel. Co. v. Hopkins* and its companion cases, 160 Cal. 106 ff. (116 P. 557), did pass on the question whether the California Constitution was violated. But the court expressly recognized

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that nothing more than one single section of the California Constitution had been raised by counsel. The court found that that section had not been violated (art. I, sec. 11), and discussed one other aspect of the case under the California Constitution. The federal Constitution was not mentioned. How a holding of this kind can result in a "rule of property" is very difficult to conceive. The federal question is before this court for the first time in this case. There is no reason why it should not be squarely met.

The other contention is that no "compelling and cogent reasons" exist in this case for a change of the status of telephone and telegraph corporations under what they conceived the law to be. I believe that such reasons do exist. Under the majority holding the counties will receive no revenue out of franchises operated by telephone or telegraph corporations. In order to meet the requirements of the various budgets involved, the tax rate in those counties is therefore correspondingly higher than it would be if these corporations were subjected to the same duty to pay now resting on the balance of the operators. By subjecting telephone and telegraph corporations to the terms of the Broughton Act and by requiring them to make the payments called for by the act, the revenue of the counties will increase and the tax rate will decrease correspondingly. The result will be a higher operating cost for telephone and telegraph corporations. But, contrary to the contention made by these corporations, this will not have any "disastrous effects" on them. They are given the

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means of obtaining permission to charge higher rates (Stats. 1915, p. 115 as amended, 2 Deering's Gen. Laws, Act 6386, Sec. 61 ff.) and will not, as they seem to contend, be driven into bankruptcy. The higher rates which telephone and telegraph corporations may then charge for their services will place the burden of paying for the use of public streets and highways where it belongs: On the subscribers to telephone and telegraph services rather than the taxpayers at large. That, in my opinion, is a reason sufficiently cogent and compelling to make a change, even if a settled situation had existed up to now. Mere lapse of time will never breathe the breath of life into a statute void for unconstitutionality, and the attempt to uphold the statute on this ground evinces a fatal weakness in the basic concept upon which the majority opinion is predicated.

The equal protection clause of the Fourteenth Amendment to the Constitution of the United States has been given renewed vigor by several recent decisions of the Supreme Court of the United States, and in view of this trend I do not anticipate that that court will depart from its pronouncement in the Frost case which is in clear conflict with the holding of the majority in the case at bar.

It is, therefore, my opinion that the judgment should be reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 514

COUNTY OF LOS ANGELES, A BODY POLITIC AND CORPORATE

Appellant,

vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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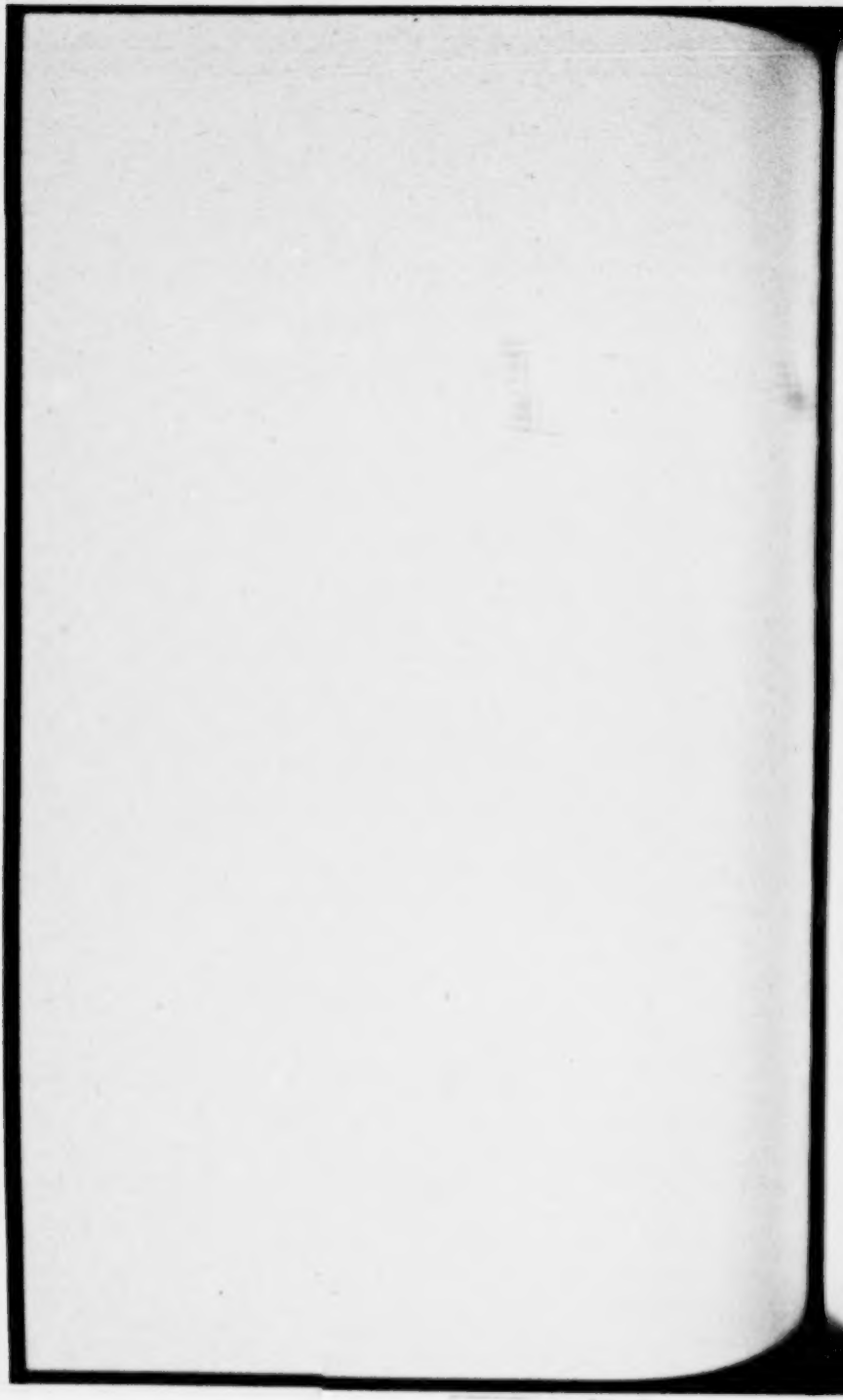

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 514

COUNTY OF LOS ANGELES, A BODY POLITIC AND CORPORATE

Appellant,

vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY, A CORPORATION,

Appellee.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Appellant county brought this suit to enjoin appellee telephone company for maintaining its lines in the public streets and highways of the county unless and until appellee should have procured a county franchise, and for an accounting and money judgment. In answer, appellee asserted as defenses that its franchise from the state under section 536 of the California Civil Code [1] is a vested right

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[1] "Telegraph or telephone corporations may construct lines of telegraph, or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

and contract secure against impairment, that the decisions of the Supreme Court of the State of California confirming over many years appellee's right to a franchise under that section constitute a rule of property, and that the county is barred by estoppel and laches. At the trial appellant's sole contention was that section 536 violated the California constitutional provisions forbidding appropriations and grants, without consideration, of the state's funds or property for specified private purposes.[2] The superior court rendered interlocutory and final opinions overruling appellant's contentions, found the statute valid and appellee possessed of a state franchise under it, found that appellant was estopped to assert the contrary, concluded inter alia that the state court decisions constituted a rule of property in appellee's favor, and gave judgment for appellee.[3] No question under the equal protection clause

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[2] Art. IV, sec. 22:

"No money shall be drawn from the treasury but in consequence of appropriation made by law, and upon warrants duly drawn thereon by the Controller; and no money shall ever be appropriated or drawn from the State treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a State institution, nor shall any grant or donation of property ever be made thereto by the State; * * *."

Art. IV, sec. 31:

"The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; * * *."

[3] Copies of these opinions and of the court's findings and conclusions of law are appended to this statement. See particularly Findings XX-XXIII, XXIV-6, XXVa, and Conclusions of Law I-V, VII, VIII, X.

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of the Federal Constitution was raised or decided, or even intimated.

Appellant appealed to the Supreme Court of the State of California, which transferred the case to the district court of appeal for hearing and decision. That court affirmed the judgment; its opinion is unofficially reported at 74 Advance California Appellate Reports 97, 168 Pacific Reporter, Second Series 207, and a copy thereof is appended to this statement. No question under the equal protection clause was raised or decided.

On June 18, 1946, the Supreme Court of the State of California granted a hearing of the case. After argument (during which no question under the equal protection clause was raised) and submission for decision, the Supreme Court on February 11, 1947, set aside the submission and invited briefs and argument on two questions of state law, namely, whether section 536 had been impliedly repealed by another California statute passed at the same session of the legislature, or whether the other statute so qualified section 536 as to require franchise payments to the county.[4] Following resubmission, the court on December 2, 1947, again set aside the submission and requested briefs and argument on a new set of questions, inviting consideration of the equal protection clause and of the standing of either party to raise the constitutional question of discrimination.[5] This was the first time any question

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[4] "1. Was section 536 of the Civil Code repealed by the Broughton Act? In this connection, the court desires to give further consideration to the holding in County of Inyo *v.* Hess, 53 Cal. App. 415.

"2. Can effect be given to both section 536 of the Civil Code and the Broughton Act by construing section 536 as an offer by the State of rights which a county may not deny, but for which a county may make a charge as provided in the Broughton Act?"

[5] "1. If, in order to reconcile Civil Code Sec. 536 and the Broughton Act, Sec. 536 is construed to apply only to telegraph and telephone *corporations* and not to *individuals* (see County of Inyo *v.* Hess, 53 C.A. 415, 423), would there be an unconstitutional discrimination and denial of

under the equal protection clause had been raised or suggested in the case.

After argument on these questions, the Supreme Court on August 13, 1948, affirmed the judgment of the superior court, with one of the seven judges dissenting. The court considered and rejected the suggestion that Section 536 of the California Civil Code violated the equal protection clause, holding that there was ample justification for the legislative classification of corporations, recognizing that the statute had been accepted as valid for many years and that vast sums had been invested in reliance on the rights granted thereby, and finding no such compelling and cogent reasons as would warrant the disturbance of its own many prior decisions upholding the constitutionality of the statute, which had become "something akin to a rule of property." On September 8, 1948, the court modified its opinion in a respect not material here. Appellant appeals, assigning error only in the holding that Section 536 does not violate the equal protection clause.

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equal protection of the laws, on the ground that only an individual and not a corporation would have to pay a franchise fee to use the highways, or that, regardless of payment of fees, the privilege to use the highways is granted only to corporations and not to individuals?) See Frost v. Corporation Com., 278 U. S. 515.) Is there any basis for a holding that there was a reasonable classification or that it was justifiable under police power?

"2. Have either of the parties to this action the proper standing to raise the constitutional question of discrimination, or can this question be raised only by an individual who has been harmed?

"3. Assuming that there would be unconstitutional discrimination under the above construction of the statutes, would Sec. 536 alone be unconstitutional or would both Sec. 536 and the Broughton Act, insofar as it applies to telephone lines, be unconstitutional? (Compare Speegle v. Board of Fire Underwriters, 29 Cal. (2d) 34, 47-48, and cases there cited.)

"4. If both Sec. 536 and the Broughton Act are unconstitutional, insofar as telephone franchises are concerned, is there any other statutory authority which would permit the county to impose the franchise fees involved here?"

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Appellee states the following matters and grounds making against the jurisdiction of this Court:

1. Appellant is a political subdivision of the State of California [6] and as such has no standing to challenge the validity under the Federal Constitution of the state statute here involved or the legislative classification which the state has made therein.

Pawhuska v. *Pawhuska Oil Co.* (1919), 250 U. S. 394;
Trenton v. *New Jersey* (1923), 262 U. S. 182, 188;
Risty v. *Chicago, R. I. & Pac. Ry. Co.* (1926), 270 U. S. 378, 390;
Williams v. *Mayor* (1933), 289 U. S. 36, 40;
Los Angeles v. *Los Angeles County Flood Control District* (1938), 305 U. S. 564;
Twin Falls County v. *Henderson* (1938), 305 U. S. 568;
City and County of Denver v. *Colorado* (1939), 307 U. S. 615;
Texas v. *City of Houston* (1944), 322 U. S. 711;
Monaghan v. *Armatage* (1945), 323 U. S. 681.

2. Appellant's sole attack upon the constitutionality of Section 536 is that the statutory grant of a franchise tendered by that statute is limited to telephone and telegraph corporations and does not include individuals or partnerships. Appellant is not a member of the class asserted to be thus discriminated against. No one can assail the validity of a statute on the ground that it impairs the constitutional rights of others.

Hatch v. *Reardon* (1907), 204 U. S. 152, 160-161;
The Winnebago (1907), 205 U. S. 354, 360;

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[6] California Constitution, Art. XI, secs. 1, 3, and 7½;
County of Los Angeles v. *Riley* (1936), 6 Cal. 2d 625, 627-628;
County of Los Angeles v. *Graves* (1930), 210 Cal. 21, 25;
County of Tulare v. *City of Dinuba* (1928), 205 Cal. 111, 117;
Reclamation District v. *Superior Court* (1916), 171 Cal. 672, 679-680,
Central Pac. Ry. Co. v. *Costa* (1927), 84 Cal. App. 577, 586-588.

Hampton v. *St. L., Iron Mt. & S. Ry.* (1913), 227 U. S. 456, 468-469;
Mallinckrodt Works v. *St. Louis* (1915), 238 U. S. 41, 54;
Heald v. *District of Columbia* (1922), 259 U. S. 114, 123;
First Nat. Bank v. *Tax Comm'n* (1933), 289 U. S. 60, 65;
Henneford v. *Silas Mason Co.* (1937), 300 U. S. 577, 583.

3. A party asserting unconstitutional discrimination has the burden of proving actual and injurious, not hypothetical, discrimination, and of negativing every conceivable basis which might support the legislative classification. The presumption of constitutionality can be overcome only by factual demonstration that the classification oppressively discriminates against particular persons and classes.

Weaver v. *Palmer Bros. Co.* (1926), 270 U. S. 402, 410;
O'Gorman & Young v *Hartf'd Ins. Co.* (1931), 282 U. S. 251, 257-258;
Detroit Brigde Co. v. *Tax Board* (1932), 287 U. S. 295, 297-298;
Borden's Co. v. *Baldwin* (1934), 293 U. S. 194, 209;
Metropolitan Co. v. *Brownell* (1935), 294 U. S. 580, 584;
Pacific States Co. v. *White* (1935), 296 U. S. 176, 185;
Madden v. *Kentucky* (1940), 309 U. S. 83, 88.

There is no evidence or other showing of discrimination in the case at bar. The record contains no hint that any individual or partnership has attempted or proposed the construction of a statewide telephone system like that operated by appellee, or has ever sought or been denied a franchise therefor on equal terms with appellee or on any terms. In the absence of such factual showing, this Court has nothing before it upon which to base a judgment of unconstitutional discrimination.

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The inequality necessary to justify setting the statute aside for unconstitutional discrimination must be actual, not conjectural, hypothetical or sporadic.

Hatch v. *Reardon* (1907), 204 U. S. 152, 160;
Williams v. *Mayor* (1933), 289 U. S. 36, 42-43;
First Nat. Bank v. *Tax Comm'n* (1933), 289 U. S. 60, 64-65;
Morf v. *Bingaman* (1936), 298 U. S. 407, 412-413.

4. The Federal question asserted by appellant is unsubstantial. The reasonableness of separate classification of corporations for the conduct of particular functions and businesses, and particularly those tinged with importance to the public, is so well settled as no longer to be an open question.

Noble State Bank v. *Haskell* (1911), 219 U. S. 104;
Shallenberger v. *First State Bank* (1911), 219 U. S. 114;
Assaria State Bank v. *Dolley* (1911), 219 U. S. 121;
Engel v. *O'Malley* (1911), 219 U. S. 128;
Crescent Oil Co. v. *Mississippi* (1921), 257 U. S. 129, 137;
Prudential Ins. Co. v. *Cheek* (1922), 259 U. S. 530, 546;
Chicago, R. I. & Pac. Ry. v. *Perry* (1922), 259 U. S. 548, 556;
Dillingham v. *McLaughlin* (1924), 264 U. S. 370;
Lawrence v. *State Tax Comm.* (1932), 286 U. S. 276, 283-284;
Phillips Petroleum Co. v. *Jenkins* (1936), 297 U. S. 629;
Hammond Packing Co. v. *Arkansas* (1909), 212 U. S. 322, 349;
Aluminum Co. v. *Ramsey* (1911), 222 U. S. 251, 255-256;
German Alliance Ins. Co. v. *Kansas* (1914), 233 U. S. 389;
Mallinckrodt Works v. *St. Louis* (1915), 238 U. S. 41, 55-56.

The majority holding in *Frost* v. *Corporation Commission* (1929), 278 U. S. 515, the only case cited in opposition, was correctly distinguished by the Supreme Court of the State of California in the case at bar. The dissenting opinion of Justice Brandeis in that case, concurred in by Justices Holmes and Stone, is undoubtedly, as the cases above cited show, the established rule of this Court.

The California legislature was entitled to consider (and in the absence of any factual showing in the record to the contrary must be presumed to have considered) facts which sustain the classification embodied in the statute. The many facts justifying such classification are familiar and well recognized; as the California Supreme Court said in the case at bar (Appendix to typewritten Statement as to Jurisdiction, pp. 24-25):

> "There is ample justification for treating corporations differently from individuals in granting franchises for the operation of telephone and telegraph systems, and there is a reasonable basis for the classification of corporations as the sole recipients of the grant offered in section 536. Corporations are in a better position than individuals to finance and carry on statewide projects of this nature, they are more easily regulated and supervised, and they have much greater permanency of existence and can give better assurance of uninterrupted service. It may be that one of the purposes of section 536 was to promote the establishment of statewide communication systems, and the use of corporate ownership and management may have been considered the best method of achieving that purpose."

Though statutes similar to Section 536 and applying to telephones and telegraphs, or to railroads, have existed for many years in most of the states of the Union, no case has been found in which such a statute was held unconstitutional on the ground of improper discrimination; on the contrary,

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where the objection has been raised, the power to limit the granting of franchises has been upheld (Appendix to typewritten Statement as to Jurisdiction, p. 25).

As a practical matter, individuals are not discriminatorily burdened by Section 536 of the California Civil Code. Anyone can obtain all the benefits of that section through the simple expedient of incorporating as a telephone or telegraph corporation.

Weed v. *Bergh* (1910), 141 Wis. 569.

5. The decision below rests upon adequate non-federal grounds. The superior court found that appellee has spent vast sums in reliance upon many judicial decisions [7] upholding the validity of Section 536 of the California Civil Code and upon the rights granted thereby.[8] Both the superior court and the supreme court of California have declared [9] that appellee has the protection of these decisions as a rule of property, a state ground of decision binding upon this Court.

Tyler v. *United States* (1930), 281 U. S. 497, 501;
United States v. *Title Ins. Co.* (1924), 265 U. S. 472, 486;
Warburton v. *White* (1900), 176 U. S. 484, 496.

The superior court also found that by a long course of conduct in many aspects, appellant is estopped to assert that appellee has not a valid franchise under Section 536 of

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[7] *Western Union Tel. Co.* v. *Visalia* (1906), 149 Cal. 744, 747;
Western Union Tel. Co. v. *Los Angeles* (1911), 160 Cal. 124, 126;
Postal Tel. Cable Co. v. *Los Angeles* (1911), 160 Cal. 129, 130;
Postal Telegraph-Cable Co. v. *Los Angeles* (1912), 164 Cal. 156, 160;
County of Inyo v. *Hess* (1921), 53 Cal. App. 415, 422, 425;
Postal Tel.-Cable Co. v. *Railroad Com.* (1927), 200 Cal. 463, 472-474;
City of Salinas v. *Pacific Tel. & Tel. Co.* (1946), 72 Cal. App. 2d 494, 497.

[8] Finding XXIII, Appendix to this Statement, p. 66.

[9] Conclusion of Law VII; Appendix to this Statement, p. 78; Appendix to Statement as to Jurisdiction, p. 27.

the California Civil Code.[10] The Supreme Court of California affirmed the judgment of the trial court without qualification and in its opinion recited the facts found and relied upon by that court as establishing this defense.[11] Estoppel to challenge the constitutionality of a statute is an adequate nonfederal ground to sustain the judgment.

Enterprise Irrig. Dist. v. *Canal Co.* (1917), 243 U. S. 157, 162-165;

Utley v. *St. Petersburg* (1934), 292 U. S. 106, 111, 112;

Hale v. *Lewis* (1901), 181 U. S. 473, 479;

Mobile, Jackson, etc., R. R. Co. v. *Mississippi* (1908), 210 U. S. 187, 204;

Bell Telephone Co. v. *Van Dyke* (1935), 296 U. S. 533.

On the foregoing matters and grounds making against the jurisdiction of this Court, appellee moves the court to dismiss with costs the appeal taken herein.

And appellee moves this Court in the alternative to affirm the judgment from which the appeal is taken on the grounds that if this Court should determine that it has jurisdiction in the premises, nevertheless the federal question raised by appellant is not substantial and there are adequate nonfederal grounds to sustain the judgment appealed from.

Dated, San Francisco, California, December 13, 1948.

Respectfully submitted,

OSCAR LAWLER,
JOHN W. HOLMES,
FRANCIS N. MARSHALL,
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[10] Findings XX-XXIII; conclusion of Law VIII; Appendix to this Statement, pp. 49-66; 79.

[11] Appendix to Statement as to Jurisdiction, p. 30.

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APPENDIX "A"

(Title of Court and Cause)

No. 410067

DECISION ON QUESTION WHETHER OR NOT C. C. 536 IS CONSTITUTIONAL

It is hardly necessary for me to say that I have profound respect for the ability of both counsel who have argued the question whether or not section 536 of the Civil Code is constitutional. Were the three of us, all from a disinterested point of view, to deal with a problem requiring much thought, and were my own conclusion to differ from that of either of counsel, I would suspect the correctness of my own analysis and deductions, and would re-examine with much care the mental processes by which I had come to that conclusion.

In respect to the question now before me I have one advantage over counsel, and I am inclined to believe that it compensates for such advantages as they may have over me. I am on the side lines, in the neutral section, with the perspective that comes from disinterestedness. They are advocates, each exceedingly loyal to his client as he ought to be.

At the outset I would express agreement with Mr. Prichard in this, that if section 536 of the Civil Code is unconstitutional, or if this court believes it to be unconstitutional, it is the duty of this court to so declare, regardless of express or implied contrary holdings of higher courts, unless the ultimate futility of such a ruling by the trial court might be so evident as to show that its only effect would be the prolonging of litigation.

Every judge of this state has taken his oath to support the constitutions, federal and state, and even the usually beneficial and necessary principle of *stare decisis* must yield to that oath.

But I do not agree with Mr. Prichard in his observation that the higher courts of this state never have passed on the question of constitutionality of that section. Because of the oath I have mentioned, and because of the principle of constitutional government under which our courts exist,

even were no formal oath taken by the judges, whenever any court enforces an act of the legislature or gives a remedy under such an act, it thereby rules that the act is constitutional. This ruling is as effective as if expressly stated. If made without the point having been raised in argument, it may be in error, or, whether right or wrong, it may be different from the ruling that would have been made had there been argument, but it is no less a decision on a question that always is at issue whenever any litigant claims a right or remedy under a statute. A court cannot excuse itself for enforcing an unconstitutional act of the legislature by saying that counsel in the case did not raise the question of constitutionality. It is the sworn duty of the court, itself, to be vigilant in guarding the Constitution, and it must be presumed that that duty has been fulfilled according to the light and ability of the judges.

In each of the ten cases cited by plaintiff's counsel on page 2 of the trial memorandum, the higher court, being the Supreme Court of this state in nine of such cases, held that section 536 of the Civil Code is constitutional. None of the cases cited by plaintiff's counsel on page 5 of the trial memorandum involved a question of constitutionality of a statute. Although, as I have said before, the oath of this judge to uphold the Constitution is paramount to the principle of *stare decisis*, still the prestige of a long succession of decisions by the highest court of the state, uniformly holding an act to be constitutional, ought to command respect and ought not to be ignored except under the most earnest and most carefully reached conviction that the high court has erred and that a resulting injustice needs correction. It may be that section 536 is so free from suspicious characteristics that it has not suggested a question of constitutionality to even one of the learned justices in even one of the many cases involving its application. Or it may be that the question has been raised in the mind of the court and has been discussed and thoroughly considered, although not commented on in any opinion because not argued. Regardless of which possibility may be the fact, the fact is significant.

For some years after the adoption of the Federal Constitution a question heatedly argued was whether Congress or the Supreme Court had the ultimate authority to decide

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whether or not an act of Congress was constitutional. There was a good deal of logical force in the contention that so important an authority ought to abide with Congress, rather than with a few justices, and that Congress ought to be not only primarily but ultimately responsible for upholding and obeying the Constitution.

Although the question finally was decided by the Supreme Court in favor of the Supreme Court, nevertheless the view that the legislative body maintains over a long period of time as to the constitutionality of a particular act is a fact of significance. For sixty-five years since the Constitution of 1879 was adopted, section 536 of the Civil Code has been recognized by the California legislature as a valid constitutional enactment. This recognition was emphasized when by the Statutes of 1905, the act was repealed to be re-enacted so as to include telephone as well as telegraph corporations and to bear a new title.

When to the foregoing facts we add the fact that in other jurisdictions statutes similar to Civil Code 536 have been held to be constitutional against constitutional provisions similar to ours, it will be evident that the plaintiff in this case is petitioning this court to take a boldly original step. Although the position in which such a plea places the judge of this department is neither a novel nor fearful one for him to be in, all the precedent and prestige standing against the plaintiff do advise the court to insist that the burden of persuasion be clearly fulfilled by the plaintiff.

It seems trite to say that the Constitution may not violate itself. When different provisions appear to be contradictory, some reconciliation must be found, for we have no authority to allow either of such provisions to fall. The constitution must be consistent within itself.

The Constitution of 1879 contained a section, section 19 of Article XI, which did for privately owned water and gas companies what C. C. 536 does for telegraph and telephone companies. The language was not exactly the same, but no substantial difference in purpose or effect existed. The original section 19, Article XI, provided in part as follows:

> "In any city where there are no public works owned and controlled by the municipality, for supplying the

same with water or artificial light, any individual or any company duly incorporated for such purpose under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations, as the municipality may prescribe for damages and indemnity for damages, *have the privilege of using the public streets* and thoroughfares thereof, and laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon condition that the municipal government shall have the right to regulate the charges thereof."

The language of the foregoing provision seems so clear as to require no construction and no search for implied or double meanings. But the provision is in direct conflict with those parts of Sections 22 and 31 of Article IV, on which plaintiff now relies, *if* Sections 22 and 31 of Article IV mean what plaintiff now claims they mean. If those sections are violated by Civil Code 536, they are violated at least in principle by Section 19, Article XI, of the Constitution itself. If sections 22 and 31 of Article IV mean what plaintiff now claims they mean, then the framers and adopters of the constitution did with the left hand what they wrote with the right hand might not be done. But such a situation may not be. While lawmakers and judges may be inconsistent and self-contradictory, the framers of a constitution may not be, for the constitution is the word of the ultimate and sovereign power.

Thus the court is compelled to question the soundness of plaintiff's present interpretation of Sections 22 and 31 of Article IV as applied to Civil Code 536. In the necessity of reconciling section 19 of Article XI with sections 22 and 31 of Article IV, we are confronted by three words demanding consideration. One is the word "gift;" one, the word "donation;" one the word "grant."

Section 31, Article IV, denies the legislature "power to make any gift or authorize the making of any gift of any public money or thing of value. . . ."

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Section 22, Article IV denies the *state* the power to make any "*grant or donation of property. . . .*"

It might be argued that there is no conflict in denying to the legislature a power like that exercised directly by the people through the Constitution, but that argument would not apply to Section 22 which denies authority to the state as such, not merely to the legislature. Furthermore, as counsel for plaintiff aptly has argued, section 31, Article IV, doubtless was written for the purpose of enunciating and writing into the basic charter a certain sound principle of government, and it is not likely that the framers of the constitution themselves would violate a principle of government that they desired to write into the foundational document for others to respect.

It is possible, as one of counsel suggested, when considering a problem such as the one now before us, to become overly concerned with definitions rather than with facts. Yet, because we are dealing with words which, theoretically at least, denote facts, we are compelled to deal with both meanings and facts. In both law and lay usage, a gift is something voluntarily bestowed without return or compensation, or, as we say in the law, without consideration. For our purposes it probably is better to think with the word "consideration," because by the legal meaning of that term, it may consist of either a benefit that moves to the promisor or a burden that is undertaken by the promisee. It seems too clear to require argument that Civil Code 536 does not give away something of value without exacting a return. Indeed the section operates strictly on a pay-as-you-enter basis. In this respect the language is not nearly so liberal as was that of the original section 19 of Article XI of the Constitution. That section made an outright investment of "the *privilege* of using the public streets" in individuals and companies that complied with a few requirements as to incorporation and purpose of business. Civil Code 536 merely says that certain companies "may erect poles, posts, piers," etc., the terminology setting nothing apart and reserving nothing, until the pole, the post, or the pier is constructed in place. Section 536 delivers nothing until the consideration is delivered to the community, and the privilege it conveys ceases to exist the minute the recipient ceases

to perform the public service, in return for which the privilege is created.

Although as previously indicated, it is not my intention to be concerned over purely academic niceties of definition, I am inclined to value a discriminating comment made in James C. Fernald's work on "English Synonyms, Antonyms and Prepositions." The work is rather old, but not nearly so old as the constitutional provisions with which we are dealing. Treating the word "gift" and its several synonyms, the famous lexicographer said: "A gift is in the popular, and also in the legal sense that which is voluntarily bestowed *without expectation* of return or compensation." This distinction penetrates to the core of the matter and causes us to realize that motive is an essential factor in the transaction. What may appear to be a gift on its face may in reality be payment intended for profit. What may in truth be a gift may, under the law of harvest, bring a return. It is evident that in enacting section 536 of the Civil Code, the legislature expected a return to the people of the state. It is equally evident that compensating good to the people of the state was the motive for the enactment. Here was no conveyance to any named corporation. Here was no preference to any named company. The invitation went forth to all comers, without any discrimination. The legislature said "we want our people to have the advantages of telegraph service;" and later, "we want our people to have the advantages of telephone service." This implied declaration was the basic premise of section 536. Continuing, the legislature said: "that we may have these modern conveniences, at the most economical rates, we make the use of our public streets and highways available to those who will provide the necessary private capital to supply the desired service."

The tendency to monopoly in this type of business is not the result of section 536, and is not promoted in the slightest degree by that section, but is inherent in the character of the business, a fact recognized and provided for by the state's regulation and by its control over rates.

Plaintiff's scholarly counsel has argued that the proposition as just stated by me is exactly the kind of propo-

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sition governing bodies had made to railroads and perhaps to other public utilities before the *Constitution of 1879* was adopted and that it is the kind of transaction the framers of the Constitution intended to abate. Counsel's statement of facts may be right, although there is a vast difference between the creation of a privilege generally for a class, making no discriminations, as is done by section 536, on the one hand, and the making of a specific conveyance or grant to a specific named person, corporate or natural, on the other hand. That difference ought to be borne in mind as one reads the cases. In any event, regardless of the precise accuracy or inaccuracy of the statement as an historical reference, it is an argument inappropriate to the point instantly under consideration.

In the simple statement of Section 31, Article IV, of the Constitution that the legislature shall not "have power to make any gift or authorize the making of any gift" of any "thing of value," we have a clear statement, expressing an idea as clearly as can be done by the language, entirely free of ambiguity, a statement that is reasonable, that means the same whether considered by itself or in its context, a statement that is consistent with the context and that, unless given an artificial or strained meaning, is not in conflict with other parts of the Constitution or with principles enunciated or approved by the Constitution. In these circumstances, there is no occasion to look to extraneous facts to learn the meaning of the words used, and under a familiar rule of construction we are not permitted to do so. If the framers of the Constitution intended to say one thing but in fact said another, doing so with perfect clarity and consistency of expression, it is not for the courts to redraft the law thus stated.

This brings me to another significant fact. Section 536 of the Civil Code was the law of the state before the Constitution of 1879 was adopted. It must be presumed that the designers of the Constitution were familiar with the section. It would have been a simple matter for the writers of the Constitution to say that no franchise to use the public streets or highways shall be granted to any telegraph company except upon payment of a substantial consideration

in money to the incorporated city or to the county wherein the use is to be made. Or it might have been said that no telegraph company shall use the public streets or highways for the placing of poles, posts, piers, etc., until it first shall have obtained from the incorporated city or from the county wherein the use is sought a franchise granting such use, for which franchise it shall pay a substantial consideration in money. The facts that a possible objective was so easy and clearly of attainment, that the subject matter was in the mind of the draftsmen, and that the clear and effective language required by the objective was not used, support a strong inference that the possible objective was not the intended one.

The second word for our consideration is the word "donation" as used in Section 22 of Article IV of the constitution. The skillful workman with words doubtless would discriminate between the word "gift" and the word "donation." The latter word often is used when the thing given is to be consumed through use within the near future. Also, more often than not, I think, the word is used in respect to a gift of money. There is another shade of meaning pointed out by Mr. Fernald in his work previously mentioned. He said: "A donation is something . . . given usually on some public ground, as to a cause or to a person representing a cause, but not necessarily of value beyond the immediate present."

As a donation is a gift and as any special shade of meaning the word "donation" may have lends nothing to plaintiff's cause, my discussion of the word "gift" and its use in the constitutional provision in question applies also to the word "donation."

I come now to the word "grant" as used in Section 22 of Article IV. A grant may or may not be a gift. One of its meanings is synonymous with the word gift. We have then at first appearance a question: Was the word "grant" intended to be synonymous with the word "gift", and was it used to supplement the word "donation" by indicating something of more permanent character than the word donation," or was the word "grant" used in its broad meaning to denote any transfer or conveyance of a thing of value, whether as a gift or for consideration?

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If it was used in that latter sense, the plaintiff has stated no cause of action except only for an outright injunction, because the complaint is founded on an alleged right claimed by plaintiff to grant to the defendant a franchise, or an easement, or a privilege by any other name, in the public streets and highways of the county, whereby the defendant might place and maintain poles, posts, piers, etc., in such streets and highways. If such a grant is forbidden by the Constitution, plaintiff is not exempt from that basic law and may not grant a franchise and may not collect any compensation for a franchise. In such a circumstance, it might be possible for plaintiff to have a cause of action for damages, but no such cause is pleaded.

As the able counsel for defendant has pointed out, if the word "grant" was used in the broad sense of denoting every transfer or conveyance of a thing of value, then neither the state nor any city or county thereof since the adoption of the Constitution of 1879 has had authority to grant any franchise. But the point may be carried to an even more absurd conclusion. If every kind of transfer and conveyance of property by the state was forbidden by the use of the word "grant" in Section 22 of Article IV, then every deed issued by the state conveying property purchased on sale for delinquent taxes is invalid as a transaction enjoined by the Constitution.

The foregoing considerations and also the context in which the word "grant" appears compel me to the conclusion that the word was used as a synonym of the word "gift," denoting the same kind of a transaction as the word "gift", and contrasting with, and supplementing, the word "donation" only in the sense that whereas the word "donation" was used in its ordinary sense of indicating something of temporary use, something to be consumed in the using, the word "grant" was used to denote things of lasting or permanent use and value.

Thus as to all three of the words in question, "gift," "donation," and "grant," we are dealing with the one idea denoted by the word "gift," which embraces the other two terms; and my discussion of the use of that word applies also to the use of the word "grant" as it is employed in the constitutional provision under consideration.

As there has been a good deal of comment on the "incalculable" value of the right created by section 536 of the Civil Code, on the millions of dollars that a company would have to pay for equivalent easements over private lands, it seems that although irrelevant to the question at hand, I should conclude with some discussion of the social and economic policy involved. Manifestly, in one form or another, the public must pay for its telephone service. This would be true if the business were owned by one giant capitalist, the state, rather than by many private citizens, all of whom are part of the public. If the telephone company were required to pay the "incalculable" sums for the privilege of placing its poles and wires in public streets or over private property, the sums so paid would have to be accounted for in the rates charged the public. Because of the peculiar nature of the telephone business, being a business wherein the unit costs, instead of being decreased by enlargement of the business, are increased, and because of the additional financing that the payment for franchise privileges would require, it is quite possible that the plan advocated by the plaintiff, resting on its contention that Section 536 of the Civil Code is unconstitutional, would cost the public more than the plan originated by the legislature and maintained by it for many decades.

When we undertake to appraise the value of using the public streets and highways, we ought not to overlook the value of such use to all persons, other than the telephone company. What is the value of that use, for instance, to a great furniture store, whose trucks must have such means for delivery of goods? What is the value of that use to a great oil company, which must deliver its products to the service station near your home and to the hundreds of other service stations near the homes of millions of other citizens? It is not necessary to go on indefinitely, giving illustrations, as one might.

Who, in the use of public streets, incommodes the public so little as does a telephone company by placing and maintaining its poles and wires? And what use of the public

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streets costs the public so little? Indeed, the question might fittingly be asked, does that use cost the public any substantial sum? True, telephone poles have been known to bring to an abrupt end the wild ride of a drunken driver. But no one not drunk would blame the telephone pole for that interference. And poles and wires may be unsightly, but so may be billboards and buildings, and so certainly are many trucks and trailers and the loads they carry. If one will drive from Bakersfield to Los Angeles at a late hour of the night, he will be impressed by the extent to which he can be incommoded, discommoded and placed in peril by the numerous trucks on the highway, and he will be inclined to a comparatively friendly feeling for telephone and telegraph poles.

The legislature has made many rules for the use of the highways, and subject to those rules, they are open to the public generally. The use made under section 536 of the Civil Code is different from that made under other acts only in the physical nature of the implementation, but so far as concerns the burden on the public, the difference definitely is in favor of the use made under section 536; and so far as concerns the principle involved, there is no difference. It is a grave mistake in thinking to set the stockholders of a telephone company apart and then to draw a line between them and the public. They are as much a part of the public as any of us. That they have been able to save some money and have invested it in an enterprise that performs a service indispensable to a modern community does not isolate them from the public nor place them in a position where their interests are adverse to those of the public. Nor do these facts mean that if such persons are able to make a fair profit on their investment they are enemies or oppressors of the public.

In establishing the legislative policy in question the foregoing considerations doubtless were in mind, and even if this court disagreed with such observations, the language used by the legislature in voicing its policy, and by the Constitution in the provisions in question, would not justify, in my opinion, voiding the act of the legislature. Hence it is my conclusion that section 536 of the Civil Code is a constitu-

tional enactment, entitled as such to the respect of, and to enforcement by, this court.

Dated May 2nd, 1944.

WILLIAM J. PALMER,
Judge.

(Endorsed:) No. 410067. Decision on Question Whether or Not C. C. 536 Is Constitutional. Filed May 2, 1944. J. F. Moroney, County Clerk, by W. L. Goff, Deputy.

APPENDIX "B"

No. 410067

(Title of Court and Cause)

NOTICE OF DECISION

In view of the extensive research and briefing done by counsel in this case, it would be an act of supererogation for this judge to attempt an additional assembly of precedents for their enlightenment. This notice is dictated for only one purpose, and that purpose is not to make a contribution to the body of the law, but rather only to inform counsel of the court's decision in this case, and, as briefly as possible, of the court's reasons for the decision.

In the final brief of counsel for plaintiff we have, I think, a correct statement of the nature and basis of plaintiff's alleged cause of action, a much clearer statement than can be gathered from the complaint itself. The cause of action, if it be such, stated as simply as possible, is this: The defendant is a trespasser upon the public highways of the county and it is such because section 536 of the Civil Code, under which defendant claims, is unconstitutional. Plaintiff concedes again that defendant maintains no nuisance except only as the bare fact of being a trespasser constitutes a nuisance. Hence, we need not discuss the subject of nuisances.

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Plaintiff seeks two remedies. It asks for two per cent of defendant's gross profits from a time two years next immediately preceding the commencement of the action, and for what plaintiff's counsel now terms a conditional injunction. The former of the two prayers suggests a novel remedy. I know of no law, theory or principle of law that would justify it and counsel has cited none. It is plain that the pleader had in mind the "Broughton Act", Act 2720, Deering's General Laws, titled the "Franchise Sales Law." But that act does not even purport to change the law governing damages for trespass, section 3333 of the Civil Code. Plaintiff has alleged no damage and has proved none. Indeed plaintiff concedes a benefit to the county, calling it an "indirect" benefit, and the evidence amply supports that concession, whether the benefit be called direct or indirect.

At an early stage of the proceedings, I informed counsel of my opinion that if Civil Code section 536 is constitutional, the complaint states no cause of action. I would reassert that opinion in the light of plaintiff's latest definition of the nature of its action.

The "conditional injunction" proposal sifts down to this: Having taken jurisdiction of the cause, a court of equity ought to make complete disposition of it, whether the appropriate relief appears to be the remedy prayed for or some other type of relief. To grant an injunction or a "conditional injunction" which might become an injunction, the effect of which would be to stop telephone service in Los Angeles County, is, of course, incomprehensible. The city police departments, fire departments, and the sheriff's office, to say nothing of all the other agencies of government or of the needs of the sick or of private citizens generally, would lose much of their effectiveness in the effort to protect the county against crime; and from the military authorities of the United States probably would come a declaration of martial law made necessary by the need for keeping the telephone service alive. If plaintiff is entitled to any relief, the remedy would be an order of this court directing the defendant to purchase a franchise from the County of Los Angeles and providing for the appointment of a commissioner or other agent of the court to execute

such a contract in behalf of the defendant in the event it should refuse to do so. An action for the franchise payments would follow if they were not paid.

In an opinion delivered at plaintiff's request in the course of the trial, I held that section 536 is a constitutional, valid enactment. To repeat the statements then made is not necessary, although I might suggest a thoughtful reading of the informal memorandum, not that counsel would gain enlightenment from it, but only that it might be fairly understood and represented. Counsel for plaintiff have been given a genuine opportunity to prove the fallacy of that opinion, and I am sure that as they see the matter, they have succeeded. I do not, however, seem to place the same value as they do on their arguments, and some brief comment on them might not be out of place.

Counsel disagree with me as to the significance of section 19, Article XI of the Constitution, whereby private water companies were given the privilege of using the public streets. They argue that this is a point in their favor, showing that the framers of the Constitution intended that the people, through the Constitution, and not the legislature, be the only power from whom such a dedication might come. But the people are the state, and counsel overlook the fact that part of section 22, Article IV, on which they rely, does not refer to the legislature but denies to the *state* the very power which, if counsel's arguments are sound, was exercised by the state in section 19, Article XI. The conclusion necessarily follows that the writers of the Constitution, in using the word "grant" in section 22, Article IV, could not have intended the establishment of a right like that announced in section 19, Article XI, which is exactly the same kind of a right in the public streets as that decreed by the legislature in section 536, Civil Code. Except only for the incidental differences in the two kinds of uses, the rights are identical in their nature.

Counsel have argued at considerable length to restrict the effect of the cases cited by themselves on page three of their trial memorandum, and to which reference was made by the court . To discuss those cases in detail would be of no importance when the one outstanding fact to which this court attached importance is not only conceded by plaintiff's

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counsel but has been emphasized with much force and underscoring. That fact is that the Supreme Court of California, consistently whenever opportunity has presented itself, has dealt with section 536 of the Civil Code as a valid, constitutional enactment.

Plaintiff's counsel have argued correctly that questions of social and economic policy are not before this court and are not in any degree determinative of the legal question submitted. This court stated the same thing in its opinion during trial and made quite clear the fact that the court commented on such points only because counsel for plaintiff previously had given them a good deal of attention.

We have further insistence that section 536, Civil Code, makes a gift of public property to telephone companies. This insistence proceeds from the contention that the right which goes to telephone companies from the state under the section is totally bare of consideration. At this point I feel that I fail in some way to comprehend counsel's reasoning, for they admit that the state has received and continues to receive a benefit from the installations and service of the defendant and its predecessors, flowing from their investment and efforts in reliance on section 536 and their adaptation to public use of the rights created by the section. Perhaps counsel attach importance not readily apparent to the designation of this benefit as an "indirect" benefit. I am not certain of understanding counsel's meaning in their use of the term "indirect" in this connection, but I see no need to discuss the question whether the admitted and significant benefit should be regarded as direct or indirect, because the law of consideration does not require that the benefit conferred be a direct as distinguished from an indirect one. Indeed, no benefit need be conferred on one party if the other assumes a burden in return for what he receives.

Evidently counsel find significance in the fact stressed by them that the defendant yet owns every telephone pole, every foot of wire, every installation made by it in the public highways; but what does that fact have to do with the question of consideration? The passing of title is not a requisite of consideration; the value of property is dependent on its use and its adaptability for use; and one may

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enjoy that value and be benefitted by such use although not the owner of title. We are reminded also that every telephone user pays for the service he receives; but this does not change the fact that the private capital of other persons was invested and risked to buy the equipment and to employ the technical knowledge, the efficiency, and judgment, required to provide the service at the rates established.

I am tempted to remind counsel of a story. The newlyweds, who had used a very long list for their wedding invitations, with a resulting stock of silverware, china, glassware, linens, et cetera, and the usual duplications, were putting their home in order when a letter came, written on quality stationery and in a good hand. The letter went like this:

> "Dear Friends: After strenuous days establishing a home and attending to the many little duties involved in placing one's house in order, I know that you will enjoy an evening at the theater. Enclosed are two tickets to the Biltmore for Friday evening of this week. I'll let you guess who is sending them.!!!!"

An appropriate and timely gift, the newlyweds thought, and they commenced guessing. Returning from the theater they were still guessing until, arriving home, they discovered the effects of a perfect burglary, with much of the silverware missing. On the dining table was a brief note saying, "Now you know who."

Yes, the theater tickets were a "gift" but I am sure that the California legislature did not intend that kind of a "gift", when they enacted section 536 of the Civil Code. Would it not prove to be a similar sort of gift if now, after the invitation of section 536 has been accepted and acted upon, after the people have received the consideration, after the telephone and telegraph systems have been established by private capital, and not by taxpayers' money or government bonds, after the people (the state) have accepted all the intended benefits, the state were to say: "Sorry, but permitting you to use the public streets was a gift, totally devoid of consideration and hence invalid,

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so move along to private property or commence paying for the gift."†

The plain fact is that when the legislature enacted section 536 it did so for only one purpose and that purpose was to encourage the use of private capital, private business judgment, and technical skill, and to invite the use of the public highways, in the establishment of a system of modern and needed communication for the benefit of the people of the state. That purpose does not comport with the conception denoted by the word "gift".

Counsel have induced me to purchase "Webster's Dictionary of Synonyms", published in 1942 to find out what the framers of the Constitution meant in 1879 when they used the word "grant" in Section 22, Article IV, whereby they denied to the state the authority to make any grant of property. This excellent work points out (p.66) that the word "grant" has general uses which are to be distinguished from the special use sometimes designated by the term "grant-in-aid". It defines this special term as quoted by plaintiff's counsel in their opening brief (pp. 14, 15), and illustrates the use of the term, as not quoted, in the following language:

> "thus grants of land (land grants) from the federal government were made to various railroads building new lines and to various colleges and universities providing agricultural and industrial courses in the mid-nineteenth century; the Rockefeller Foundation makes grants chiefly to institutions engaged in health and medical research."

Counsel for plaintiff seem to contend that the framers of our Constitution, when using the word "grant" in restricting the power of the state, used it in that special sense sometimes denoted by the term "grant-in-aid", as that term is defined and its use illustrated in Webster's Dictionary of Synonyms. This definition and these illustrations may, indeed, be helpful. One of the essentials appears to be a specific, named grantee. We can eliminate certain possibilities. For reasons pointed out in my opinion delivered in course of trial, we must conclude that the Consti-

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tution does not forbid grants for compensation, although the language specifies no such exception. For reasons also pointed out in that opinion, the reasonable deduction is that the makers of the Constitution did not intend to forbid designations of use of public highways in the installation and maintenance of certain necessary public utilities for the public benefit, as was done by the Constitution itself in respect to private water companies. It seems quite probable, therefore, that what the framers of the Constitution intended to forbid was the giving away of public lands and moneys to specific, named private corporations, associations and other institutions, in the manner illustrated in the cited work on synonyms.

If we shall be realistic, we shall note a decided and important distinction between the outright grant of a tract of land or the donation of a sum of money or the grant of a monopolistic franchise to a specific, named private corporation or association, for its exclusive use, on the one hand, and, on the other hand, the provisions of section 536, Civil Code, whereby it is directed that among the many uses to which public highways may be put shall be the use by telephone and telegraph companies, not any one such company, but all such companies then in existence or thereafter to be formed, so long as other users of the highways are not incommoded.

The use of the word "exclusive" in connection with the right conferred by section 536 has been greatly over-emphasized. Such "exclusive" right as this section confers comes only from the law of physics, that two bodies may not occupy the same space at the same time, and not from any other necessary implication in the code section. In providing that the telegraph and telephone installations must not incommode the public use of the highway, the law places the telegraph and telephone companies, as to such installations, at the bottom of the list among highway users, and that position is a far cry from exclusiveness. No company is given an exclusive right over any other company in this restricted use of the highways. All must be accommodated, and the road commissioner or other authority in charge may order a pole moved whenever in his discretion

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such moving is required by the public convenience. Because of the law of physics the parked automobile has the same "exclusive" use of a bit of the highway, while it is parked, as the telephone company has of a tinier bit of ground, off the traveled portion of the highway, while the pole remains in place. Indeed the "exclusive" privilege of the parked car, except in a restricted parking area, rests on a more secure basis than does that of the telephone pole, although in most instances the function of the parked car is purely private and often to serve a pleasure-bent owner.

The guarded and restricted privilege of the telephone company is such a different status from the ownership of fee title to a section of land and from the ownership of a monopolistic franchise and from the ownership of a sum of money that one must totally ignore facts to insist that because all are property rights no distinction may be made between them.

The familiar principle, often announced, and stated again recently in Hill v. Fowble, 65 A.C.A. 45 (3), is that the practical construction given a contract by the parties in their conduct and actions while executing the agreement is strong evidence of what was intended. This principle applies with extraordinary force and appropriateness to section 536, Civil Code, in respect to which, since the adoption of the Constitution, and until the preliminaries of filing of the instant suit, the practical construction adopted by the state in all departments called upon to construe the section and its relationship to the Constitution has been uniform, and consistent with the validity of the section.

This observation brings me to the question of estoppel. Counsel for plaintiff have foreclosed the defense of estoppel with such absoluteness and finality, shutting their case off from it with such iron-clad, water-proof, fire-proof, and bullet-proof encasement as to invite some suspicion of the merit of the argument, because we like to think of the doctrine of equitable estoppel as a principle having a degree of flexibility, capable of being molded into the factual form of a given case when justice cannot be done without it, and hence a principle, the application of which

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nearly always is debatable, and which presents some appeal to the conscience and discretion of the chancellor.

California no doubt would recognize the principle of equitable estoppel if there were no statutes on the subject. However, we do have legislative enactments to which we may look to learn the nature and scope of the principle. They are section 1962, par. 3, Code of Civil Procedure, and sections 3512, 3515, 3516, 3517, 3519, 3521 and 3528 of the Civil Code.

The method of counsel for plaintiff in disposing of the defense of estoppel in this case is as simple as it is precise and efficient. The steps are as follows: (1) Section 536 is unconstitutional. (2) Hence, every act by an official of the state which has rested upon, assumed or recognized the act as a valid enactment, has been ultra vires. (3) The state may not be bound by the ultra vires acts of its official agents. (4) Therefore, no estoppel can rise against the state from those acts.

In support of step (2) counsel cite a number of cases on page 36 of their opening brief. These cases announce the familiar rule that acts of public officials "in excess" of the power conferred upon them are ultra vires and not binding on the state, county or city involved.

There appears to be a weakness in the argument that comes from ignoring the fact that all the official conduct upon which defendant relies in the defense of estoppel was conduct within the scope of the authority vested in the respective officials, and the further fact that defendant relies not only on acts but on omissions to act. The legislature has authority to legislate and to be the first to determine the constitutionality of a proposed enactment. It has power to err in deciding that question, but there is a rebuttable presumption that its decision is correct and that the statutes it creates are constitutional. Executive and administrative officers of the state have the right, if not a duty, to rely on that presumption until it is overcome. The Supreme Court has authority to question the validity of a statute, to decide whether or not it is constitutional, to announce its decision, and to err in its judgment. The county assessor and the county tax collector have full

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authority to do everything they did which is included in the recitation of facts upon which defendant relies. They, too, have authority to err in the judgment they are required by law to exercise. The same rule applies to the road commissioner and to the board of supervisors and to the district attorney and to the county counsel. A significant feature of the defense of estoppel in this case is that no act or proceeding included in the long series of official conduct upon which defendant has relied was an act or proceeding done or conducted in excess of the authority vested in the respective officials.

Counsel for plaintiff cite the four requisites of estoppel, as summed up and stated on page 627 of 10 California Jurisprudence. As stated in that work, the four listed conditions generally are required, but the pages that follow to page 645 must be read, if one does not read all the cases cited to learn that those four requisites are not nearly so rigid as they appear in the summary and that in practical application the doctrine is as flexible as I suggested at the outset of this discussion.

Much importance appears to be attached to the fact that defendant and its predecessors, having able counsel to advise them, always have been in equal position with the plaintiff to know the law. We may conclude, of course, as counsel for plaintiff urge, that defendant and its predecessors have relied on the advice of their own counsel. But these facts and deductions do not seem to me to be a complete answer. As former Chief Justice Hughes once wrote, the law is what the Supreme Court says it is, and if a lawyer may not rely on what the Supreme Court of his state has done, and if he may not rely on what the legislature has done, with the later sanction of the Supreme Court, and if he may not rely on what many other capable officials of the state have done, they in turn relying on the legislature and the Supreme Court, then it may not be said that he has had a fair opportunity to know the truth and a fair basis upon which to advise his client. If all the officials of the state with whose conduct he must be concerned combine to deceive him, certainly the fact that he is a lawyer, with his own right to have thoughts as to

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what the law is or should be, does not deprive him of the right or rid him of the necessity of advising his client in accord with the practical interpretation placed on the law by the officials of the state.

If counsel for plaintiff now are right, then every tax that has been collected from the defendant and its predecessors levied against the "franchise" held under section 536, has been wrongfully collected because if defendant has been only a trespasser, it has had no franchise to be assessed or taxed, and this is the kind of irreconcilable reversal of position, I think, with which the law is concerned in connection with the doctrine of estoppel. The county, through the many years, has assessed and collected taxes from the defendant and its predecessors claiming that they have held a valid, valuable and taxable property right under section 536. The county has used that money and makes no offer to restore; indeed, does not even come before the court and admit having collected the money wrongfully or even offer to credit the wrongfully collected sums against the franchise payments it seeks. Yet by this action it would make a complete reversal of its position and would declare the defendant to be only a trespasser. This, I think, is rather typical of the kind of situation for which the doctrine of estoppel was conceived to implement the purpose of the court to do justice and to prevent injustice.

It is the decision of the court that the plaintiff is not entitled to take anything by this action. Counsel for defendant will prepare findings, conclusions and judgment.

This case is now on the court's calendar for Monday, August 21, 1944, having been placed there pending the filing of briefs and the consideration thereof and decision by the courts. As there is no occasion for its being on the calendar in the light of this decision, it is ordered off calendar.

Dated: August 18, 1944.

WILLIAM J. PALMER,
Judge of the Superior Court.

(Endorsed): No. 410067. Notice of Decision, Filed Aug. 18, 1944. J. F. Moroney, County Clerk, by W. L. Goff, Deputy.

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APPENDIX "C"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 410067

COUNTY OF LOS ANGELES, Plaintiff,

v.

SOUTHERN CALIFORNIA TELEPHONE COMPANY, a corporation, Defendant.

Findings of Fact and Conclusions of Law

This cause came on regularly for trial on the 26th day of April, 1944, before the court sitting without a jury in Department 12 thereof, the plaintiff being represented by J. H. O'Connor, Esq., County Counsel of the County of Los Angeles, by S. V. O. Prichard, Esq., Assistant County Counsel, and Gerald G. Kelly, Esq., and A. Curtis Smith, Esq., Deputies County Counsel, and the defendant being represented by Messrs. Pillsbury, Madison & Sutro and Messrs. Lawler, Felix & Hall, by Oscar Lawler, Esq., John W. Holmes, Esq., and Thomas H. Hearn, Esq., its attorneys, and oral testimony and documentary evidence having been offered by the parties respectively and received by the court, and the parties, through their respective counsel, having made and entered into certain stipulations and admissions, both oral and in writing, and counsel for the respective parties having submitted oral arguments and written briefs, and the court, having heard and considered all of the testimony and evidence so offered and received, and having heard, read and considered all of the said stipulations and admissions of counsel and having considered said arguments and briefs and being fully advised in the premises, now makes its findings of fact and conclusions of law herein as follows:

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Findings of Fact

I

Plaintiff is now and during all the times herein stated has been a body politic and corporate, a county of the State of California.

II

Ever since the 19th day of April, 1916, defendant has been and is now a corporation, organized and existing under the laws of the State of California for the purpose, among other purposes, of engaging in the telephone and telegraph business. Ever since its incorporation defendant has been and is now a wholly owned subsidiary of the Pacific Telephone and Telegraph Company, which now owns and at all times since the incorporation of defendant has owned all issued and outstanding capital stock of defendant.

III

At all times between and including the 27th day of April, 1889, and the 30th day of April, 1937, Sunset Telephone and Telegraph Company (hereinafter called "Sunset") was a corporation organized and existing under the laws of the State of California for the purpose, among other purposes, of engaging in the telephone and telegraph business, and at all times during the period commencing on or about the 27th day of April, 1889, and until on or about the 2nd day of January, 1907, said Sunset engaged in and carried on, in the State of California and in other states of the United States, an exchange and interexchange, intrastate and interstate telephone, and an intrastate and interstate telegraph business, and for such business maintained and operated, in the State of California and in said other states of the United States, an exchange and interexchange, intrastate and interstate telephone and intrastate and interstate telegraph system. At all times during said period, Sunset, for the purposes and as a part of its said business and system, constructed, maintained and operated, and held itself out to the public as constructing, maintaining and operating, telephone lines and lines of telegraph along and upon the public

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roads and highways and along and across the lands and waters of the State of California and of the incorporated and unincorporated areas of the plaintiff County, and constructed, erected, maintained and operated along and upon said roads and highways and along and across said lands and waters, poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines in such manner and at such points as not to incommode the public use of any such road or highway or to interfere with the navigation of any such waters, and by means thereof rendered telephone and telegraph service to the public.

IV

At all times since the 31st day of December, 1906, said The Pacific Telephone and Telegraph Company (hereinafter called "Pacific") has been and now is a corporation organized and existing under the laws of the State of California for the purpose, among other purposes, of engaging in and carrying on, and it has engaged in and carried on and is now engaging in and carrying on in the State of Califoria and in other states of the United States, an exchange and interexchange, intrastate ad interstate telephone and intrastate and interstate telegraph business, and for such business manitained and operated, in the State of California and in said other states of the United States, an exchange and interexchange, intrastate and interstate telephone and intrastate and interstate telegraph system. At all times since the 2nd day of January, 1907, said Pacific, for the purposes of its said business, and as a part of said system, has constructed, maintained and operated, and has held itself out to the public as constructing, maintaining and operating, telephone lines and lines of telegraph along and upon the public roads and highways and along and across the lands and waters of the State of California, and has constructed, erected, maintained and operated along and upon said roads and highways and along and across said lands and waters, poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines in such manner and at such points as not to incommode the public use of any of said roads or

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highways or to interfere with the navigation of said waters and by means thereof rendered telephone and telegraph service to the public. Continuously during the period from on or about the 2nd day of January, 1907, to the 31st day of May, 1930, said Pacific, as a part of its said system and business, constructed, erected, maintained and operated its said lines and its said poles, posts, piers and abutments for supporting said lines along and upon the public roads and highways and along and across the lands and waters in and throughout the incorporated and unincorporated areas of the plaintiff county, and by means thereof rendered and continued to render telephone and telegraph service to the public.

V

1. On the 2nd day of January, 1907, and the 17th day of October, 1907, said Sunset leased to said Pacific for a period of thirty (30) years all of said Sunset's said system and all property, real and personal, owned and used by it in and in connection with its said telephone and telegraph system in the States of California, Washington and Oregon, including all of said Sunset's rights, privileges, franchises and property, except its corporate franchise, in and throughout the said states. Said leasing was accomplished by two indentures in writing, copy of each of which has been received in evidence herein, marked respectively "Defendant's Exhibit 19" and "Defendant's Exhibit 20."

2. Continuously from and after January 2, 1907, said Pacific maintained, operated, carried on and added to and extended the said telephone and telegraph business, system and property so leased to it by said Sunset, and by means thereof rendered telephone and telegraph service to the public.

3. On the 8th day of January, 1917, pursuant to and upon the authority of orders and decisions Nos. 3845 and 3959 of the Railroad Commission of the State of California, duly given and made respectively on November 4, 1916 (reported in Vol. 11 CRC at page 806), and December 29, 1916 (reported in Vol. 12 CRC at page 115), said Sunset sold, granted, conveyed, assigned and transferred to said

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Pacific all of said Sunset's property of every kind and nature whatsoever and wheresoever situated, including franchises, but excluding its corporate franchise, and including in particular said Sunset's said telephone and telegraph property and system. A copy of said conveyance has been received in evidence herein, marked "Defendant's Exhibit 22".

4. Except as hereinafter set forth, said Pacific, ever since the 8th day of January, 1917, has continued to and now does own the telephone and telegraph property, rights and franchises so acquired by it from said Sunset, and continues to and does now operate, maintain and extend the same.

VI

1. On the 30th day of April, 1917, pursuant to said order and decision No. 3845 of the Railroad Commission of the State of California (11 CRC 806), said Pacific sold, granted, assigned, transferred and conveyed to the defendant the Los Angeles and Eagle Rock Telephone exchanges of said Pacific, including all properties, both real and personal, and all rights and franchises, owned by said Pacific in the cities of Los Angeles, Watts, Vernon, Eagle Rock and Huntington Park in the County of Los Angeles, and in portions of the unincorporated areas of said county, within said exchanges, contiguous and adjacent to said cities, but excluding said Pacific's toll lines and the rights and franchises therefor in said exchanges. The boundaries of said Los Angeles and Eagle Rock telephone exchanges were, prior to and on said 30th day of April, 1917, established by the said Railroad Commission and are shown by red lines on a map received in evidence herein and marked "Defendant's Exhibit 27". A copy of said conveyance has been received in evidence herein marked "Defendant's Exhibit 24."

2. Continuously since the 30th day of April, 1917, the defendant has continued to, and still and now does, own, maintain, operate and extend the telephone and telegraph properties and system so acquired by defendant from said Pacific, in conjunction with and as a part of the general

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exchange and interexchange, intrastate and interstate telephone and intrastate and interstate telegraph system owned and operated by defendant.

VII

1. At all times between the 22nd day of September, 1902, and the 30th day of April, 1917, Home Telephone and Telegraph Company (hereinafter called "Home of Los Angeles") was a corporation organized and existing under the laws of the State of California for the purpose of engaging in the telephone and telegraph businesses, and for the purposes of said business constructed, operated and maintained a telephone system, and as a part of said system constructed, maintained and operated and held itself out to the public as constructing, maintaining and operating telephone lines along and upon the public roads and highways, and along and across the lands and waters in the plaintiff county, and erected poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines in such manner and at such points in the said public roads, highways, lands and waters as not to incommode the public use of any of said roads or highways or to interfere with the navigation of any of said waters and by means of said system rendered telephone service to the public. Said telephone system of said Home of Los Angeles was maintained and operated in competition with said telephone and telegraph system owned, maintained and operated successively by said Sunset and said Pacific, in the area fixed, established and designated by the Railroad Commission of the State of California, as the Los Angeles Exchange of said Home of Los Angeles, and shown by yellow lines on the map received in evidence and marked "Defendant's Exhibit 27" herein.

2. Pursuant to said order and decision No. 3845 of the Railroad Commission of the State of California (11 CRC 806) and on the 30th day of April, 1917, said Home of Los Angeles sold, granted, assigned, transferred and conveyed to the defendant all of the real and personal property, including franchises, of Home of Los Angeles (except the corporate franchise, corporate records, cash, bills receiv-

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able and securities on hand), and particularly including the said telephone and telegraph properties and system then and theretofore owned, maintained and operated by said Home of Los Angeles. A copy of said conveyance has been received in evidence in this cause, marked "Defendant's Exhibit 23."

3. The aforesaid telephone and telegraph properties of said Pacific and of said Home of Los Angeles so conveyed to defendant as hereinbefore set forth were consolidated into and maintained and operated as a single unified telephone and telegraph system, and by means thereof defendant rendered and continues to render telephone and telegraph service to the public.

VIII

1. At all times between and including the 2nd day of June, 1904, and the 1st day of October, 1918, San Fernando Valley Home Telephone Company (hereinafter called "San Fernando Home") was a corporation organized and existing under the laws of the State of California for the purpose of engaging in the telephone and telegraph business, and for the purposes of said business owned, operated and maintained a telephone system in competition with the business and system of said Pacific in portions of the incorporated and unincorporated areas within the plaintiff county, particularly in the cities of Glendale and Burbank and unincorporated areas contiguous and adjacent to said cities, and for the purposes of its said business and as a part of said system constructed, maintained and operated, and held itself out to the public as constructing, maintaining and operating, telephone lines along and upon the public roads and highways within said county, and poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines in said roads and highways in such manner and at such points as not to incommode the public use of any of said roads or highways, and by means thereof rendered telephone service to the public.

2. On or about the 1st day of October, 1918, pursuant to and upon the authority of decision No. 5316 of the Rail-

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road Commission of the State of California, made April 16, 1918 (reported in Vol. 15 CRC, at page 572), said San Fernando Home sold, granted, conveyed, assigned and transferred to said Pacific all of the telephone plant and system of said San Fernando Home and all properties owned by it and used in connection therewith, including franchises, except its corporate franchise.

3. Pacific incorporated the telephone property, rights and franchises so acquired by it from said San Fernando Home into and consolidated the same with the telephone and telegraph system and property of said Pacific, and continued by means thereof to render telephone and telegraph service to the public.

IX

1. At all times between and including the 29th day of April, 1903, and the 18th day of October, 1907, Compton Home Telephone and Telegraph Company (hereinafter called "Compton Home") was a corporation organized and existing under the laws of the State of California for the purpose of engaging in the telephone and telegraph business, and for the purposes of said business owned, operated and maintained a telephone system in competition with the said telephone and telegraph business and system successively operated, as hereinbefore mentioned, by said Sunset and said Pacific in the incorporated and unincorporated areas within the plaintiff county, particularly in the city of Compton and in the unincorporated areas contiguous and adjacent to said city, and for the purposes of its said business and as a part of its said system, constructed, maintained and operated, and held itself out to the public as constructing, maintaining and operating telephone lines along and upon the public roads and highways within said county, and constructed, erected, maintained and operated along and upon said roads and highways poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines in such manner and at such points as not to incommode the public use of any of such roads or highways, and by means thereof rendered and continued to render telephone service to the public.

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2. On or about the 18th day of October, 1907, said Compton Home, for a valuable consideration, transferred and conveyed to Consolidated Utilities Company all of its assets and property of every kind and nature, including its said telephone system.

3. At all times between on or about the 6th day of October, 1907, and on or about the 31st day of May, 1930, said Consolidated Utilities Company (hereinafter called "Consolidated") was a corporation organized and existing under the laws of the State of California for the purpose of engaging in the telephone and telegraph business.

4. Continuously from the 18th day of October, 1907, until the 31st day of May, 1930, said Consolidated continued to own, maintain, operate and extend the telephone system and properties so acquired by it from said Compton Home, and by means thereof to render telephone service to the public.

X

At all times during the period commencing on or about the 28th day of June, 1903, and ending on or about the 31st day of May, 1930, Home Telephone & Telegraph Company of Pasadena (hereinafter called "Pasadena Home") was a corporation organized and existing under the laws of the State of California for the purpose of engaging in the telephone and telegraph business, and for the purposes of said business owned, operated and maintained a telephone system in the City of Pasadena and in unincorporated areas contiguous thereto, and for the purposes of its said business and as a part of its said system constructed, maintained and operated, and held itself out to the public as constructing, maintaining and operating, telephone lines along and upon the public roads and highways of the incorporated and unincorporated areas of said county, and erected, maintained and operated along and upon said roads and highways poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines in such manner and at such points as not to incommode the public use of any of such roads or highways, and by means thereof rendered and continued to render telephone service to the public.

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XI

Continuously between on or about the 3rd day of September, 1902, and on or about the 31st day of May, 1930, United States Long Distance Telephone & Telegraph Company (hereinafter called "USLD") was a telephone and telegraph corporation organized and existing under the laws of the State of California, engaged in and carrying on, in competition with the business and system of said Pacific in the counties of Los Angeles, Orange, Riverside, San Diego, San Bernardino, Santa Barbara and Ventura, an interexchange intrastate and interstate toll and long distance telephone business and for such business maintained and operated, in and throughout said counties, an interexchange intrastate and interstate toll and long distance telephone system. At all times during said period USLD, for the purposes of its said business and as a part of its said system, constructed, maintained and operated, and held itself out to the public as constructing, maintaining and operating, telephone lines along and upon the public roads and highways and along and across the lands and waters of the State of California and of the incorporated and unincorporated areas of the plaintiff county, and constructed, erected, maintained and operated, along and upon said roads and highways and along and across said lands and waters, poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines, in such manner and at such points as not to incommode the public use of any of said roads or highways or to interfere with the navigation of any such waters, and by means thereof rendered and continued to render telephone service to the public.

XII

1. On the 31st day of May, 1930, under and pursuant to the authority of decision No. 22333 of the Railroad Commission of the State of California, made April 14, 1930 (reported in Vol. 34 CRC at page 584), said Pacific sold, granted, conveyed, assigned and transferred to the defendant all of the telephone and telegraph property, assets and business of said Pacific in the counties of Santa Barbara,

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Ventura, San Bernardino, Los Angeles, Orange, Riverside, San Diego and Imperial, including real and personal property of all kinds and including all franchises (except its corporate franchise) owned by said Pacific in said counties. A copy of said conveyance has been received in evidence herein, marked "Plaintiff's Exhibit I."

2. Under and pursuant to the authority of said decision No. 22333 of the Railroad Commission of the State of California (34 CRC 584), said Pasadena Home, on the 31st day of May, 1930, sold, granted, conveyed, assigned and transferred to the defendant all of the property, assets and business of said Pasadena Home, including all of its real and personal property of every kind and including all its franchises (except its corporate franchise). A copy of said conveyance has been received in evidence in this cause, marked "Defendant's Exhibit 16." Upon making said conveyance and continuously thereafter said Pasadena Home retired from the telephone business.

3. Under and pursuant to the authority of said decision No. 22333 of the Railroad Commission of the State of California (34 CRC 584) said Consolidated, on the 31st day of May, 1930, sold, granted, conveyed, assigned and transferred to the defendant all of the property, assets and business of Consolidated, including all of its real and personal property of every kind and including all its franchises (except its corporate franchise). A copy of said conveyance has been received in evidence in this cause, marked "Defendant's Exhibit 17." Upon making said conveyance and continuously thereafter said Consolidated retired from the telephone business.

4. Under and pursuant to the authority of said decision No. 22333 of the Railroad Commission of the State of California (34 CRC 584), said USLD on the 31st day of May, 1930, sold, granted, conveyed, assigned and transferred to defendant all of the property, assets and business of said USLD, including all of its real and personal property of every kind and including all of its franchises (except its corporate franchise). A copy of said conveyance has been received in evidence in this cause, marked "Defend-

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ant's Exhibit 28." Upon making said conveyance and continuously thereafter said USLD retired from the telephone business.

5. Said Sunset, Pacific, Home of Los Angeles, Pasadena Home, Compton Home, Consolidated, San Fernando Home and USLD are hereinafter sometimes referred to collectively as the defendant's corporate predecessors in interest.

XIII

Defendant consolidated said properties so conveyed to it by said Pacific, Pasadena Home, Consolidated and USLD with the said telephone and telegraph system then and theretofore owned, maintained and operated by defendant, as hereinbefore found, and continued to maintain and operate the same in conjunction with and as a part of defendant's said telephone and telegraph system and by means thereof has rendered and still continues to render telephone and telegraph service to the public.

XIV

1. The telephone and telegraph system so owned, maintained and operated by defendant as aforesaid has at all times been and now is a single and unified system, and has been and still is constructed, maintained and operated by the defendant as such. Said system has been throughout said time and is now being added to and extended by the defendant to meet the needs and demands of public telephone and telegraph service. By means of said system the defendant now engages in and carries on, and throughout all of said time has engaged in and carried on, a public exchange and interexchange intrastate and interstate telephone and intrastate and interstate telegraph system and business. Said system extends, and throughout all of said time has extended, throughout portions of the incorporated and unincorporated areas of this state and of the plaintiff county and, ever since the 31st day of May, 1930, has extended and now extends throughout the incorporated and unincorporated areas of the counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, San Diego and Imperial.

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2. In connection with and as a part of said system, the defendant has throughout all of said time owned, constructed, maintained and operated, and held itself out to the public as owning, constructing, maintaining and operating, and now owns, maintains and operates, lines of telegraph and telephone lines consisting of conduits with wires therein and poles and wires attached thereto, and of posts, piers, abutments and other necessary fixtures and appurtenances of said lines in, over and along substantially all of the streets, alleys and public highways and along and across the waters and lands throughout the incorporated and unincorporated areas of the County of Los Angeles and, ever since the 31st day of May, 1930, also along and upon substantially all of the streets, alleys and public highways and along and across the waters and lands throughout the incorporated and unincorporated areas of the counties of Santa Barbara, Ventura, Orange, Riverside, San Bernardino, San Diego and Imperial. Through the instrumentality of said exchange and interexchange and intrastate and interstate telephone and intrastate and interstate telegraph system and said conduits, poles, wires and other fixtures and appurtenances employed in conjunction therewith, defendant has been throughout all of said time, and now is, rendering throughout the incorporated and unincorporated areas aforesaid, to the public, exchange and interexchange, intrastate and interstate telephone, and intrastate and interstate telegraph services.

3. At all of said times said system, so owned, maintained and operated by the defendant, has included numerous telephone and telegraph instruments and stations; said system, at the time of the commencement of this action, and now, includes more than nine hundred thousand telephone stations, each of which has been and is an integral part of said system, and is and has been used and in use for public telephone and telegraph communication and service by connection with many hundreds of thousands of telephone stations in the states of California, Oregon, Washington, Idaho and Nevada, and with many millions of telephone stations throughout the United States and in foreign countries.

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4. The defendant's said system is, and at all of said times has been, so operated and maintained that, as a part of defendant's public telephone service, each such telephone station therein could be and can be connected and conversation had by means thereof, and of said telephone and telegraph lines, with each and every other of said telephone stations in said states of California, Oregon, Washington, Idaho and Nevada, and with each of said many millions of telephone stations throughout the United States and in foreign countries.

5. During all of said times all of the defendant's said telephone lines and lines of telegraph, and its said conduits, poles, wires, posts, piers, abutments, fixtures and appurtenances, which have been or now are in, along or upon the public roads, highways, streets, alleys, lands and waters in this state, have been and now are constructed, erected and maintained in such manner and at such points as not to incommode the public use of any of such roads, highways, streets or alleys or to interrupt the navigation of any of such waters.

XV

1. On or about the 3rd day of February, 1903, the Board of Supervisors of plaintiff county adopted an ordinance designated as Ordinance No. 67 (N. S.) of said county, granting to one Arthur Wright and his assigns the right and privilege for the period of forty (40) years from and after the 2nd day of March, 1903, to construct, erect, maintain and operate telephone lines and lines of telegraph under, upon, over and along the streets, alleys and public highways of the plaintiff county, then or thereafter established. Copy of said ordinance has been received in evidence in this cause, marked "Plaintiff's Exhibit J."

2. Thereafter, and on or about the 3rd day of February, 1903, said Arthur Wright assigned, transferred and conveyed all of his rights under said Ordinance No. 67 (N. S.) to one F. F. Graves.

3. On or about April 18, 1904, said F. F. Graves assigned, transferred and conveyed all of his rights under said Ordinance No. 67 (N. S.) to said USLD.

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XVI

1. On or about the 7th day of April, 1903, the Board of Supervisors of plaintiff county adopted an ordinance, designated as Ordinance No. 70 (N. S.) of said county, granting to one Arthur Wright and his assigns the right for the period of fifty (50) years from and after the 1st day of May, 1903, to construct, erect, maintain and operate telephone lines and lines of telegraph under, upon, over and along the streets, alleys and public highways then or thereafter established within the area known as Cahuenga Valley Road District, in and of the plaintiff county. Copy of said ordinance has been received in evidence in this cause, marked "Plaintiff's Exhibit B." There have been received in evidence in this cause, marked respectively "Plaintiff's Exhibit C" and "Plaintiff's Exhibit D," a legal description and a map of said Cahuenga Valley Road District.

2. On or about the 7th day of May, 1903, said Arthur Wright assigned, transferred and conveyed all of his rights under said Ordinance No. 70 (N. S.) to one F. F. Graves.

3. On or about May 24, 1904, said F. F. Graves assigned, transferred and conveyed all of his rights under said Ordinance No. 70 (N. S.) to said Home of Los Angeles.

XVII

On or about the 29th day of June, 1903, the Board of Supervisors of plaintiff county adopted an ordinance, designated as Ordinance No. 77 (N. S.) of said county, granting to said Compton Home and its assigns the right for the period of thirty (30) years from and after the 21st day of July, 1903, to construct and operate telephone lines and lines of telegraph over and along the public streets, alleys and public highways of the plaintiff county within the voting precincts of Compton, Downey, Clearwater, Gardena, Wiseburn and Redondo Beach City. Copy of said ordinance has been received in evidence in this cause, marked "Plaintiff's Exhibit H."

XVIII

1. On or about the 31st day of May, 1904, the Board of Supervisors of the plaintiff county adopted an ordinance

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designated as Ordinance No. 108 (N. S.) of said county, granting to one Arthur Wright and his assigns the right for the period of thirty (30) years from and after the 21st day of June, 1904, to construct, maintain and operate telephone lines and lines of telegraph under, upon, over and along the streets, alleys and public highways of the plaintiff county, then or thereafter established, within the San Fernando, Los Angeles, Canada and Crescenta Road Districts as the same were then established. Copy of said ordinance has been received in evidence in this cause, marked "Plaintiff's Exhibit G." The boundaries of the area covered by said Ordinance No. 108 (N. S.) appear upon a transparency received in evidence herein and marked "Plaintiff's Exhibit M," for use as an overlay to the map received in evidence herein and marked "Plaintiff's Exhibit A."

2. Thereafter, and on or about the 1st day of October, 1904, said Arthur Wright assigned, transferred and conveyed all of his rights under said Ordinance No. 108 (N. S.) to San Fernando Home.

3. Thereafter, and on or about October 1st, 1918, by order and authority of said Railroad Commission, San Fernando Home transferred and conveyed all of its rights under said Ordinance 108 N. S. to said Pacific.

XIX

1. On or about the 17th day of October, 1905, the Board of Supervisors of the plaintiff county adopted an ordinance, designated as Ordinance No. 129 (N. S.) in and of said county, granting to said Home of Los Angeles and its assigns the right and privilege for the period of thirty (30) years from and after the 1st day of November, 1905, to construct, maintain and operate a telephone and telegraph system under, upon and over the public streets, lanes, highways and places in that part of the plaintiff county lying outside of and immediately adjacent to the city of Los Angeles and within a radius of eight miles from the intersection of Ninth and Main Streets in said City. A copy of said ordinance has been received in evidence in this

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cause, marked "Plaintiff's Exhibit F." There has been received in evidence in this cause, marked "Plaintiff's Exhibit E," a map of the respective areas covered by said Ordinances No. 70 (N. S.) and 129 (N. S.).

2. Said Home of Los Angeles, on April 30, 1917, pursuant to the order and authority of said Railroad Commission, transferred and conveyed all of its rights under said ordinance to defendant.

XX

Each said corporate predecessor in interest of the defendant, and the defendant, respectively at all times held itself out as constructing, maintaining and operating, and each did construct, maintain and operate telephone lines and/or lines of telegraph along and upon the public roads and highways and along and across the lands and waters of this state and of the incorporated and unincorporated areas of the plaintiff county, and as erecting poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines, in such manner and at such points as not to incommode the public use of said roads or highways or interfere with the navigation of such waters, pursuant to and in reliance upon the offer and tender of the right, privilege and franchise so to do by Section 536 of the Civil Code of the State of California; and each said corporate predecessor in interest of the defendant, and defendant, at all times openly and notoriously constructed its said lines and erected said poles, posts, piers and abutments for supporting said insulators, wires and other necessary fixtures of said lines, and claimed said right, privilege, authority and franchise so to do under and pursuant to said Section 536 of said Civil Code; that all of the facts stated in this paragraph were at all times well known to said plaintiff county and to its duly constituted officers.

XXI

Each said corporate predecessor in interest of the defendant, and defendant, at great cost and expense, respectively and successively enlarged, extended and improved its

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telephone and/or telegraph system to meet and supply the constantly increasing need and demand for telephone and telegraph service by the public, and respectively and successively constructed telephone lines and/or lines of telegraph along and upon the public roads and highways and along and across the lands and waters of the unincorporated area of said county, and erected poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines, in such manner and at such points as not to incommode the public use of said roads or highways or to interfere with the navigation of such waters, and said construction and erection by each said corporate predecessor in interest of the defendant, and by the defendant, were made openly and notoriously and under and pursuant to the claim of right that under said Section 536 of said Civil Code of California each respectively and successively had the right, privilege, authority and franchise to construct telephone lines and/or lines of telegraph along and upon the public roads and highways and along and across the lands and waters of this state and of the incorporated and unincorporated areas of the plaintiff county in such manner and at such points as not to incommode the public use of said roads or highways or to interfere with the navigation of such waters. At all of said times the plaintiff county well knew of said claim of right by each said corporate predecessor in interest of the defendant, and by the defendant, and in all respects acquiesced therein, and recognized, acknowledged, conceded and agreed that each said corporate predecessor in interest of the defendant, and the defendant, respectively and successively had the said right, privilege, authority and franchise so respectively and successively claimed by it, and the plaintiff county did not in any wise interfere with, object to or (except as hereinafter found) question the exercise of said right, privilege, authority and franchise by either of said corporate predecessors in interest of the defendant, or by the defendant, respectively and successively, but on the contrary the plaintiff county, by its acquiescence aforesaid, induced each said corporate predecessor in interest of the defendant, and the defendant, to believe that the plaintiff county recog-

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nized, acknowledged, conceded and agreed that each said corporate predecessor in interest of the defendant, and the defendant, respectively and successively, had said right, privilege, authority and franchise as aforesaid. All of said telephone lines and lines of telegraph so constructed, and all of said poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines so erected by said corporate predecessors in interest of the defendant, and by the defendant, as hereinbefore found, were constructed and erected by them respectively in the belief, induced as aforesaid, that the plaintiff county recognized, acknowledged, conceded and agreed that said corporate predecessors in interest of the defendant, and the defendant, respectively and successively had said right, privilege, authority and franchise so respectively and successively claimed by each of them. The plaintiff county acquiesced, recognized, acknowledged, conceded and agreed as aforesaid with the intention that such acquiescence, recognition, acknowledgment, concession and agreement would be acted upon by said corporate predecessors in interest of the defendant, and by the defendant, respectively and successively, in so constructing said telephone lines and lines of telegraph, and in so erecting said poles, posts, piers and abutments; and said corporate predecessors in interest of the defendant, and the defendant, in constructing said telephone lines and lines of telegraph, and in erecting said poles, posts, piers and abutments, respectively and successively relied upon said acquiescence by the plaintiff county and its said recognition, acknowledgment, concession and agreement that said corporate predecessors in interest of the defendant, and the defendant, respectively and successively had said right, privilege, authority and franchise so claimed by them.

XXII

1. Between on or about the 20th day of January, 1913, and on or about the 12th day of May, 1914, the Board of Supervisors of the plaintiff county considered the question whether the defendant's said corporate predecessor in interest, The Pacific Telephone and Telegraph Company, and

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other telephone and/or telegraph corporations respectively, had a franchise to use and occupy the public roads and highways of the unincorporated areas of the plaintiff county for their telephone lines or lines of telegraph, and the further question whether the defendant's said predecessor and such other corporations could be required by the plaintiff county to obtain from said county a franchise so to do. The fact that said Board of Supervisors had said questions under consideration came to the attention of the defendant's said predecessor on or about the 22nd day of January, 1913. During the time when said Board of Supervisors had said questions under consideration, as aforesaid, the plaintiff county refused to grant to the defendant's said predecessor, or to other such corporations, permits to make excavations in the public roads and highways of said county for the purpose of erecting their poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of their lines. On or about the 12th day of May, 1914, the said Board of Supervisors, duly assembled in meeting and acting upon the opinion and advice of the county Counsel of said county, concluded, decided and agreed that said Pacific and all other telephone and/or telegraph corporations which accepted and availed themselves of the right, privilege and franchise offered and tendered by Section 536 of the Civil Code of the State of California by constructing their telephone lines and/or lines of telegraph in such roads and highways, and rendered to the public telephone and/or telegraph service by means thereof, thereby become the owner of the franchise from the State of California, to so use and occupy and continue to use and occupy such roads and highways, and could not be required to obtain franchises from the said county so to do, but could only be required to obtain permits from said county to make excavations in the public roads and highways for the purpose of constructing thereon telephone lines and lines of telegraph and poles, posts, piers and abutments for supporting the insulators, wires and other fixtures of said lines along and upon said public roads and highways, pursuant to applications duly made for such permits pursuant to the ordinances of said county in these

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findings hereafter referred to. Thereupon, said county resumed the granting, and ever since said 12th day of May, 1914, has continued to grant, to the defendant's said predecessors in interest, and ever since the 30th day of April, 1917, has granted and continued to grant to defendant, permits to make such excavations for said purposes in such roads and highways in said county pursuant to applications therefor and without obtaining, from said county, any franchise so to use and occupy the said roads and highways for telephone lines and lines of telegraph.

2. On or about the 10th day of September, 1935, the County Auditor of the plaintiff county, by letter addressed to the Board of Supervisors of said county, advised said Board that he had notified the defendant that said Ordinance No. 129 (N.S.) of said county would expire on the 31st day of October, 1935, and suggesting that the defendant file application for a renewal of the franchise granted by said ordinance at an early date, and further advising that the defendant had acknowledged receipt of such notification and had stated that it had the matter under consideration. In and by said letter the said County Auditor suggested to said Board of Supervisors that it refer said matter to the County Counsel with instructions that he proceed against the defendant on November 1, 1935, in the event the defendant failed to make application for a renewal of said franchise. On or about September 16, 1935, said Board of Supervisors, duly assembled in meeting, ordered that the matter mentioned in said letter from said County Auditor be referred to the County Counsel with instructions to proceed against the defendant on November 1, 1935, in the event that the defendant failed to make application for a renewal of said franchise. On or about October 18, 1935, the defendant, by a letter to said County Auditor, advised him that the defendant would not apply for a renewal of said franchise, for the reason that it had been advised by its attorneys that it was fully invested with a franchise to maintain and operate its telephone lines and lines of telegraph along the public roads and highways and along and across the lands and waters in said county without such renewal.

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On or about the 29th day of October, 1935, the County Counsel of the said county advised said Board of Supervisors, in substance and effect, that the defendant was possessed of a franchise under Section 536 of the Civil Code of California to construct its telephone lines and lines of telegraph along and upon the public roads and highways of the plaintiff county and could not be required to obtain a franchise from said county so to do. (Copy of the letters hereinbefore mentioned in this paragraph have been received in evidence herein as parts of defendant's Exhibit 52.)

Upon receiving the said letter of October 29, 1935, from the County Counsel, the said Board of Supervisors, duly assembled in meeting, on or about November 12, 1935, ordered that the same be placed on file. The fact that said letters were written by the said County Auditor and the said County Counsel to the said Board of Supervisors, and the said actions taken by the said Board with reference thereto, came to the attention and knowledge of the defendant at or about the times when said letters were written and said actions taken respectively. On or about the 9th day of December, 1935, the said County Counsel advised said Board of Supervisors by letter, among other things, as follows:

> "Although the courts of this state have consistently recognized the statutory franchise of telephone and telegraph companies and have held that no franchise from a county is required, we think that for the protection of the interests of the taxpayers and in the effort to preserve this source of revenue if possible, an action would be justified. It is possible that we may be able to persuade our courts to reverse their decisions and adopt a different view of the law than they have maintained in the past, and as the privilege enjoyed by the telephone companies of operating in this county is a valuable one, some revenue should be forthcoming to the taxpayers therefrom if not barred by our Constitution and laws.
>
> "I am informed that there is at least one area in this county in which no franchise tax has ever been

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paid. May I suggest that this office be authorized to bring an action for accounting as to such area, and in conjunction therewith to bring either an action in quo warranto or for injunction—whichever may be the most efficacious remedy—to test the general power of the telephone companies to operate without a franchise from the county."

Upon receiving said last mentioned letter, and on or about December 9, 1935, said Board of Supervisors, duly assembled in meeting, authorized said County Counsel to bring an action for accounting as to area in the county in which no franchise had ever been paid, and in conjunction therewith to bring either an action in quo warranto or for injunction, to test the general power of telephone companies to operate without franchise from the county. (Copies of the said letter of the County Counsel, of December 9, 1935, and minutes of the Board of Supervisors at its meeting of December 9, 1935, taking the action aforesaid, have been received in evidence herein as parts of plaintiff's Exhibit R.) Neither the fact that said County Counsel had written said letter of December 9, 1935, nor the said action of the Board of Supervisors with reference thereto, ever came to the notice, knowledge or attention of the defendant until the trial of this cause.

3. At various times between said 19th day of May, 1905, and the date of the commencement of this action, the Board of Supervisors of plaintiff county passed and adopted successive ordinances regulating the making of excavations and fills and the doing of other work in the public highways of said county. Said successive ordinances included the following designated ordinances, to wit:

(a) Ordinance No. 133 (N.S.), entitled "An Ordinance regulating the making of excavations and fills and the doing of other work in public highways of the County of Los Angeles." Said ordinance was passed and adopted January 9, 1906, took effect on February 1, 1906, and continued in effect until June 1, 1909. A copy of said ordinance No. 133 (N.S.) has been received in evidence herein, marked "Defendant's Exhibit 1."

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(b) Ordinance No. 205 (N.S.), entitled "An Ordinance regulating the making of excavations, and fills, and the doing of other work in public highways of the County of Los Angeles." Said ordinance was passed and adopted May 10, 1909, took effect on June 1, 1909, and continued in effect until June 15, 1911. A copy of said ordinance No. 205 (N.S.) has been received in evidence herein, marked "Defendant's Exhibit 2."

(c) Ordinance No. 213 (N.S.), entitled "An Ordinance to amend Ordinance No. 205, new series, entitled 'An Ordinance regulating the making of excavations and fills and the doing of other work in public highways of the County of Los Angeles,' adopted May 10th, 1909." Said Ordinance No. 213 (N.S.) was passed and adopted June 28, 1909, and took effect on July 15, 1909. A copy of said ordinance No. 213 (N.S.) has been received in evidence herein, marked "Defendant's Exhibit 3."

(d) Ordinance No. 266 (N.S.), entitled "An Ordinance regulating the use of highways, traffic over the same, the making of excavations and fills and the doing of other public work thereon." Said ordinance was passed and adopted May 29, 1911, and took effect on June 15, 1911. A copy of said ordinance No. 266 (N.S.) has been received in evidence herein, marked "Defendant's Exhibit 4."

(e) Ordinance No. 372 (N.S.), entitled "An Ordinance prescribing the regulations under which permits shall be issued for the making of excavations and fills, and the performance of other work on public roads and highways within the County of Los Angeles." Said ordinance was passed and adopted September 29, 1914, and took effect on October 28, 1914. A copy of said ordinance No. 372 (N.S.) has been received in evidence herein, marked "Defendant's Exhibit 5."

(f) Ordinance No. 675 (N.S.), entitled "An Ordinance prescribing the regulations under which permits shall be issued for the making of excavations and fills, and the performance of other work on public roads and

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highways within the County of Los Angeles." Said ordinance was passed and adopted May 25, 1921, took effect on June 26, 1921, and ever since has been and now is in effect. A copy of said ordinance No. 675 (N.S.) has been received in evidence herein, marked "Defendant's Exhibit 6."

In substance, the provisions of each of said ordinances, material to this action, were as follows: Each of said ordinances prohibited the making of excavations and fills in public highways, or the traveled portion thereof, of said county, without first obtaining a permit therefor, as in said respective ordinance provided, from the Board of Supervisors or official of said county as specified in each respective ordinance; and each of said respective ordinances prescribed the manner of obtaining such permit, to wit, the filing with said Board of Supervisors, or with the other official of said county designated in said respective ordinance, of a written application describing specifically the location, nature and extent of the proposed work and the purposes thereof; and each of said ordinances, except said Ordinance No. 133 (N.S.), further provided that said application should show the nature of the right of the applicant to do such work, or to the use and occupancy, for the purpose mentioned in the application, of the highway wherein the excavation was proposed to be made, and that if it appeared that the applicant was lawfully entitled under any franchise to do such proposed work at the place and in the manner proposed, such board or official mentioned in each respective ordinance should grant a written permit to the applicant for the proposed work or such part thereof as it or he might find the applicant entitled to do.

On many hundreds of occasions during the period of time between said 19th day of May, 1905, and the date of the commencement of this action, the said several corporate predecessors in interest of the defendant, and the defendant, respectively and successively, made applications, pursuant to said respective ordinances hereinabove described, to the board or official specified in each such respective ordinance for permits to excavate in said public roads and highways for the purpose of erecting poles, posts, piers

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and abutments for supporting the insulators, wires and other necessary fixtures of their respective telephone lines and/or lines of telegraph. Said applications were made on printed forms prescribed and furnished by the plaintiff county, and in making said applications the said corporate predecessors in interest of the defendant, and the defendant, respectively and successively specified in the space provided in said forms for the specification of the applicant's right to occupy the highway for the purpose stated, said Section 536 of the Civil Code of the State of California; and each of said several applications was approved and permit granted pursuant thereto by the plaintiff county, and thereupon the plaintiff county issued and delivered to the respective corporation having made said application (being one of the said corporate predecessors in interest of the defendant, or the defendant, as the case might be) a permit in writing, duly executed by the official of the plaintiff county authorized to execute the same, by the terms of which the applicant was by the plaintiff county granted permission to make the excavation for which such permit was applied for, for the purpose of erecting such poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of said lines, with full knowledge on the part of the plaintiff county that the applicant (being one of the respective corporate predecessors in interest of the defendant, or the defendant, as the case might be) intended to erect said poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of its said lines, under and pursuant to its claim of right, privilege, authority and franchise under said Section 536 of said Civil Code, as aforesaid, and at no time did the plaintiff county refuse to grant any such permit upon the ground that the said corporate predecessors in interest of the defendant, or any of them, or the defendant, had no right, privilege, authority or franchise to construct, maintain and operate telephone lines and/or lines of telegraph or to erect poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of their said lines along or upon such roads or highways.

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In reliance upon said permits, said respective corporate predecessors in interest of the defendant, and the defendant, respectively and successively, laid out large sums of money in constructing, maintaining and operating telephone lines and/or lines of telegraph and in erecting poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of their said telephone lines and/or lines of telegraph along and upon the public roads and highways in said county, and neither of the said corporate predecessors in interest of the defendant, nor the defendant, would have so laid out said large or any sums or sum of money unless they had respectively received said permits. Between and including the 18th day of July, 1910, and the 4th day of December, 1914, the plaintiff county, acting by and through its duly authorized officers and agents, issued and granted to said Pacific and to said Pasadena Home, each of which was and is a corporate predecessor in interest of the defendant, at least 173 such permits, pursuant to applications therefor duly made by said corporations respectively, as hereinbefore found. Between an unascertained date in the year 1914 and on or about the 2nd day of June, 1930, the plaintiff county, acting by and through its duly authorized officers and agents, issued to said The Pacific Telephone and Telegraph Company approximately 3458 such permits, in addition to those mentioned in the last preceding sentence hereof, pursuant to applications therefor duly made by said last mentioned corporation, as hereinbefore found. Between on or about the 30th day of April, 1917, and on or about the 10th day of July, 1941, the plaintiff county, acting by and through its duly authorized officers and agents, issued to the defendant approximately 7141 such permits, each pursuant to an application therefor duly made by the defendant, as hereinbefore found. Between said last mentioned date and the time of the trial of this cause the plaintiff county has continued to, and still and now does, regularly and in the due course of the administration of its affairs, issue such permits to the defendant pursuant to such applications therefor, duly made by the defendant, as hereinbefore found.

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4. On twenty-seven (27) separate occasions between and including the 23rd day of February, 1915, and the 25th day of May, 1937, said plaintiff county requested said Pacific, one of the corporate predecessors in interest of the defendant, and the defendant, respectively and successively, in connection with and because of street and highway improvement work undertaken by the plaintiff county, to relocate parts of their said respective telephone lines and lines of telegraph and some of their said poles, posts, piers, and abutments for supporting the insulators, wires, and other necessary fixtures of their said lines, which said Pacific and the defendant had respectively and successively constructed and erected along and upon the public roads and highways of the unincorporated area of the plaintiff county, and said Pacific and the defendant respectively and successively complied with said requests; and said requests were made by said county and complied with by said Pacific and by the defendant, as herein found, with full knowledge on the part of said county that said Pacific and the defendant respectively and successively claimed the right, privilege, authority, and franchise, under said Section 536 of the Civil Code of the State of California, to construct, maintain and operate their said respective telephone lines and lines of telegraph along and upon the public roads and highways of said state and of the unincorporated area of said county, and to erect their said respective poles, posts, piers and abutments for supporting the insulators, wires, and other necessary fixtures of their said lines, in such manner and at such points as not to incommode the public use of said roads or highways.

In most instances when such relocations were so required by the plaintiff county, said Pacific and the defendant respectively and successively made the same in the public roads and highways of said county under and pursuant to excavation permits issued by said county, in the form and of the character of the permits hereinbefore described; and each of said permits was issued following and pursuant to an application in writing made by said Pacific or by the defendant, as the case might be, specifying, in the space provided in said application for specification of the right of the applicant to occupy the highway for the purpose

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shown in the application, said Section 536 of the Civil Code of the State of California, as hereinabove found. In all other such instances the said county knowingly required and permitted said Pacific and the defendant, respectively and successively, to make such required relocations in the public roads and highways of said county without the formality of any such written permit and without the necessity on the part of either of said corporations of making any written application for any such permit.

5. Upon completion by the defendant, or by either of its said corporate predecessors in interest, as the case might be, of the work of locating or relocating any of its poles, posts, piers, abutments or other equipment or accessories for supporting the insulators, wires and other necessary fixtures of its lines of telegraph and/or telephone, pursuant to the said permits issued by the plaintiff county, as found in this paragraph XXII of these findings, the said completed work was inspected in each instance by a duly authorized officer or agent of the plaintiff county who reported his findings with regard thereto to the Road Department of said county. In no such case was it found or reported by such inspecting officer or agent of the plaintiff county that the place or manner of such installation or relocation was such as to incommode, obstruct or interfere with the public use of the road or highway in which the same was made. In each such case where the work authorized by any such permit involved breaking of the pavement or other surfacing of the traveled portion of any public road or highway by the defendant or either of its said corporate predecessors in interest, such work was inspected by an employee of said Road Department during its progress. In each such case of installation or relocation by the defendant or either of its said corporate predecessors in interest requiring restoration of such pavement or surfacing, such restoration was undertaken and completed by said Road Department. All costs and expenses of each such installation or relocation were borne and paid directly by the permittee in each such case, and all costs to the plaintiff county for such inspections and restorations of pavement or surfacing of roads and highways by said

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county or any of its officers or agents were reimbursed and paid to said county by the permittee in each such case.

6. On numerous occasions since on or about said 19th day of May, 1905, the plaintiff county successively requested said respective corporate predecessors in interest of the defendant, and the defendant, and still and now continues to request the defendant, to furnish to the said county telephone and telegraph service from and to various points in and outside of the unincorporated areas of said county by means of portions of the said telephone and telegraph system of said corporate predecessors in interest of the defendant, and of the defendant, situate in said unincorporated area of said county. The said corporate predecessors in interest of the defendant, and the defendant, in compliance with said requests, respectively and successively furnished, and defendant continues to furnish to said county telephone and telegraph service from and to various points in and outside of the unincorporated area of said county by means of said telephone and telegraph system of said corporate predecessors in interest of the defendant, and of the defendant, including the portions of said system situate in said unincorporated area of said county, and for that purpose said predecessors in interest of defendant from time to time constructed and maintained, defendant still and now constructs and maintains telephone lines and lines of telegraph along and upon the public roads and highways of said unincorporated area of said county, and poles, posts, piers and abutments for supporting the insulators, wires, and other necessary fixtures of their said lines, in such manner and at such points as not to incommode the public use of said roads or highways, and said predecessors in interest of defendant at all times have made available, respectively and successively, and defendant now makes available to said county telephone and telegraph service from and to all points in and outside of said unincorporated area of said county where the said corporate predecessors in interest of the defendant, and the defendant, respectively had or the defendant now has such telephone and telegraph service available, by means of said portions of said telephone and telegraph system of said corporate predecessors

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in interest of the defendant, and of the defendant. The plaintiff county made and continues to make said requests with full knowledge that in order to comply therewith it was and would be necessary for said corporate predecessors in interest of the defendant, and the defendant, respectively, to furnish and make available the service so requested over and by means of said telephone lines and lines of telegraph situate along the public roads and highways and along and across the lands and waters in said unincorporated area of said county, and for that purpose to construct, maintain and operate the necessary telephone lines and lines of telegraph along and upon said public roads and highways and along and across said lands and waters in said unincorporated areas of said county, and to erect along and upon said roads and highways and along and across said lands and waters the necessary poles, posts, piers, and abutments for supporting the insulators, wires, and other necessary fixtures of their said lines. Such telephone and telegraph service was and continues to be requested by and was and continues to be furnished and made available to said county, and to be paid for by said county at the regular rates prescribed for such service by said Railroad Commission with full knowledge on the part of said county that each said corporate predecessor in interest of defendant, and defendant, respectively and successively claimed, and that the defendant continues to claim the right, privilege, authority and franchise under and pursuant to said Section 536 of the Civil Code of said state, to construct, maintain and operate its telephone lines and lines of telegraph along and upon the public roads and highways and along and across the lands and waters of this state and of the unincorporated area of said county, and to erect poles, posts, piers and abutments for supporting the insulators, wires, and other necessary fixtures of said lines, in such manner and at such points as not to incommode the public use of said roads or highways or to interfere with the navigation of such waters. All of the said telephone and telegraph service so rendered and furnished to the plaintiff county by the defendant and its said corporate predecessors in interest has been and is now used by the plaintiff

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county in and about the handling, carrying on, facilitation and expedition of its public business, affairs and functions, including particularly the public business, affairs and functions of its sheriff and other peace officers.

7. For each fiscal year including and between the fiscal year ending June 30, 1906, and the fiscal year ending June 30, 1935, excepting the fiscal years ending respectively June 30, 1907, June 30, 1916, June 30, 1919, June 30, 1921, June 30, 1922, and June 30, 1926, the plaintiff county assessed and levied respectively and successively against said corporate predecessors in interest of the defendant and against the defendant, for purposes respectively of Road Improvement Districts and Flood Control Districts in said county and for other purposes, taxes upon said franchise to use the public highways for the telephone lines and lines of telegraph by defendant and its said respective predecessors in interest; that said taxes were so levied and assessed with full knowledge that said franchise was the franchise claimed and held by said corporate predecessors in interest of the defendant, and by the defendant, respectively and successively, under and pursuant to said Section 536 of the Civil Code of the State of California; that each said corporate predecessor in interest of the defendant, and the defendant, respectively, paid all of said taxes so levied against them respectively as aforesaid. In levying and assessing said taxes, said county intended to tax and did tax the right, privilege, authority or franchise, under said Section 536 of said Civil Code, of the said corporate predecessors in interest of the defendant, and of the defendant, to construct telephone lines and/or lines of telegraph along and upon the public roads and highways and along and across the lands and waters in said county, and to erect poles, posts, piers and abutments for supporting the insulators, wires, and other necessary fixtures of their said lines, in such manner and at such points as not to incommode the public use of said roads or highways or to interfere with the navigation of such waters. The plaintiff county has not at any time returned or repaid, or tendered, offered or agreed to repay, either to the defendant or to any of its said corporate predecessors in interest so paying said taxes,

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any portion of the taxes so paid to and collected by the plaintiff county from the defendant and its said corporate predecessors in interest respectively.

8. The plaintiff county, by doing and performing the several acts, matters and things by it done and performed, as herein found, induced the respective corporate predecessors in interest of defendant, and defendant, to believe, and they and each of them were thereby induced by said acts, matters and things severally and in combination of any two or more of said acts, matters and things to, and each of said respective corporate predecessors in interest of defendant and defendant did, believe, that the plaintiff county acquiesced, recognized, acknowledged, conceded and agreed that the said corporate predecessors in interest of defendant, and defendant, respectively and successively, had the lawful right, privilege and franchise granted by said state under and pursuant to said Section 536 of said Civil Code to construct telephone lines and/or lines of telegraph along and upon the public roads and highways of this state and of the unincorporated areas of the plaintiff county and along and across the lands and waters of this state and of said county, and to erect poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines, in such manner and at such points as not to incommode the public use of said roads or highways or to interrupt the navigation of said waters. Acting in reliance upon said belief, which it sincerely entertained in the exercise of its own counsels and in which belief it was confirmed, supported and encouraged by the conduct of plaintiff county as aforesaid, each said corporate predecessor in interest of defendant, and defendant, respectively and successively proceeded to and did at great cost and expense construct its said telephone lines and/or lines of telegraph along and upon the public roads and highways and along and across the lands and waters of this state and of the incorporated and unincorporated areas of the plaintiff county and proceeded to and did erect its poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines in said roads and highways and along and

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across said lands and waters in such manner and at such points as not to incommode the public use of said roads or highways or to interrupt the navigation of said waters, as hereinafter set forth.

XXIII

1. In their said reliance and belief, sincerely entertained in the exercise of their own judgment and out of their own counsels, and in which belief they were confirmed, supported and encouraged by the plaintiff county as hereinbefore found, and pursuant to and in acceptance of the offer of right, privilege and franchise contained in and made by Section 536 of the Civil Code of California, each of said corporate predecessors in interest of the defendant, and the defendant, respectively and successively, continuously from and after the times when they respectively commenced to do business as hereinbefore found, extended its lines of telegraph and telephone lines and constructed, erected and from time to time acquired, by means of the outlay and expenditure of large sums of money, poles, conduits, wires and other parts, equipment and appurtenances of its said respective telephone and/or telegraph systems along and upon the public roads and highways and along and across the lands and waters within the incorporated and unincorporated areas of the plaintiff county.

2. Hereinafter in this subparagraph are set forth, as of and up to the respective dates specified, the number of miles of poles, conduits and wire so constructed, erected and acquired by said Pacific and said Home of Pasadena and by the defendant, respectively, in said unincorporated areas of the plaintiff county (see Defendant's Exhibits 54 and 55):

Date	Name of Company	Miles of Poles	Number of Poles	Miles of Conduits	Miles of Wire
Dec. 31, 1910	Pacific.....	475	.....	None	6,225
Dec. 31, 1929	Pacific.....	430	.....	42.32	41,712
Dec. 31, 1925	Home of Pasadena....	85.00	.....	1.6	3,232
Dec. 31, 1929	Home of Pasadena....	96.0	.....	3.6	5,550
Dec. 31, 1917	Defendant.....	85.7	.....	0.4	2,071.9
Dec. 31, 1936	Defendant.....	.....	30,954	574.00	316,619.5

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3. Up to and as of the 31st day of December, 1936, the total investment of the defendant in the operative properties of its said telephone and telegraph system in this state was the sum of $171,263,297.10 and its total investment in pole lines, cable, aerial wire and underground conduit was $73,429,561.05.
(See Defendant's Exhibit 49.)

4. Up to and as of the 31st day of December, 1936, the total investment of the defendant in pole lines, wire lines and underground conduit erected along and upon the public roads and highways and along and across the lands and waters in the unincorporated areas of the plaintiff county was as follows:

Pole lines	$1,453,378.77
Wire lines	5,499,539.84
Underground conduit	1,201,701.87
Total	$8,154,620.48

(See Defendant's Exhibit 50.)

XXIV

1. The defendant has not at any time attempted to procure from the plaintiff county any franchise authorizing or permitting the defendant to construct, maintain or operate any telephone line, or any lines of telegraph, or to erect, construct or install any of the parts, appurtenances or fixtures of any such line in, upon or along any of the public roads or highways or along or across any of the waters of or within plaintiff county.

2. It is untrue that the defendant does not have, or that it has not had, a franchise covering or granting to it the right or privilege of constructing or maintaining its said or any telegraph and/or telephone line or system, or any poles, conduits, wires or other appurtenances employed in conjunction therewith, in, under, upon, over or along any portion of the streets, alleys or public highways of the plaintiff county.

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3. That at the time of the execution of the instrument of conveyance referred to in finding VIII, subdivision 2, and the instrument of conveyance referred to in finding XII, subdivision 1, no action had been taken by plaintiff or its Board of Supervisors to rescind or set aside or otherwise modify or nullify Ordinance No. 108 N. S. or the franchise described in said ordinance or to show or indicate that plaintiff considered that said ordinance and said franchise were not or that either thereof was not, in force and effect; and in so far as shown by the records of said county said ordinance and said franchise were in force and effect until the end of the period specified therein. That subsequent to the execution of the conveyance referred to in finding XII, subdivision 1, the defendant never at any time made any oral or written statement to the plaintiff whereby defendant expressly asserted to the plaintiff that defendant was exercising or was operating under, or because of, the franchise granted by said Ordinance No. 108 (New Series).

4. That at the time of the execution of the instrument or conveyance referred to in finding IX, subdivision 2, and the instrument of conveyance referred to in finding XII, subdivision 3, no action had been taken by plaintiff or its Board of Supervisors to rescind or set aside or otherwise modify or nullify Ordinance No. 77 N. S. or the franchise described in said ordinance or to show or indicate that plaintiff considered that said ordinance and said franchise were not or that either thereof was not, in force and effect; and in so far as shown by the records of said county said ordinance and said franchise were in force and effect until the end of the period specified therein. That subsequent to the conveyance referred to in finding XII, subdivision 3, the defendant never at any time made any oral or written statement to plaintiff whereby defendant expressly asserted to the plaintiff that defendant was exercising or was operating under, or because of, the franchise granted by said Ordinance No. 77 (New Series.)

5. That at the time of the execution of the conveyance referred to in finding XII, subdivision 4, no action had been

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taken by plaintiff or its Board of Supervisors to rescind or set aside or otherwise modify or nullify Ordinance No. 67 N.S. or the franchise described in said ordinance or to show or indicate that plaintiff considered that said ordinance and said franchise were not or that either thereof was not, in force and effect; and, insofar as shown by the records of said county said ordinance and said franchise were in force and effect until the end of the period specified therein. That subsequent to the execution of the conveyance referred to in finding XII, subdivision 4, the defendant never at any time made any oral or written statement to the plaintiff whereby said defendant expressly asserted to the plaintiff that defendant was exercising or was operating under, or because of, the franchise granted by said Ordinance No. 67 (New Series).

6. At all times since the defendant commenced to do business within the plaintiff county and elsewhere, as hereinbefore found and described, it has owned and exercised the right, privilege, authority and franchise to construct, maintain and operate telephone lines and lines of telegraph along and upon the public roads and highways and along and across the waters and lands within this state, and to erect poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of its said lines, in such manner and at such points as not to incommode the public use of such roads or highways or interrupt the navigation of such waters, which right, privilege, authority and franchise were during all of said times and now are granted to and conferred upon it by Section 536 of the Civil Code of California.

7. It is not true that the defendant has at any time used or occupied or that it is now using or occupying any of the streets, alleys or public highways in any unincorporated or other area of the plaintiff county in dispensing or providing any type or kind of telephone and/or telegraph service in any manner whatsoever without any right or authority so to do. It is true that the defendant has not at any time paid to the plaintiff county any toll, rental, consideration or charge for such right or authority.

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XXV

1. That commencing on or about November 13, 1911, and annually thereafter until on or about April 30, 1917, the defendant's predecessor, Home Telephone and Telegraph Company, filed with the Board of Supervisors of the plaintiff, at the times and in the manner required by the terms of Ordinance No. 129 (New Series), a statement verified by the oath of one of its corporate officers, duly authorized to so act, to the effect that the payment which accompanied each such statement amounted to two per cent (2%) of the gross receipts of said company for the period named in said statement, derived by said company from its operations in the unincorporated area described in said franchise. That at or about April 30, 1917, the defendant filed with the Board of Supervisors of the plaintiff an executed copy of the instrument to show transfer of said franchise granted by said Ordinance No. 129 (New Series) from Home Telephone and Telegraph Company to the defendant; that thereafter annually the defendant filed with the Board of Supervisors of the plaintiff, at the times and in the manner required by the terms of said Ordinance No. 129 (New Series), a statement verified by the oath of one of its corporate officers, duly authorized so to act, to the effect that the payment which accompanied each such statement amounted to two per cent (2%) of the gross receipts of the defendant for the period named in said statement arising from defendant's operations in the unincorporated area described in said franchise, exclusive of the area within that covered by Ordinance No. 70 (New Series). That the statements and payments made by the defendant and its said predecessor in interest to the plaintiff as aforesaid were made annually for the period of time covered by said Ordinance No. 129 (New Series), which continued until October 31, 1935. That subsequent to October 31, 1935, no such statement or payment ever has been made by the defendant to the plaintiff under or by virtue of said Ordinance No. 129 (New Series) or any other ordinance or franchise, or otherwise, excepting only the payment of taxes by reason of the assessment against the defendant by the plaintiff on defendant's rights under Civil Code Section 536, termed a franchise by plaintiff's assessor, as herein else-

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where found. That the aggregate of all of the payments which accompanied the verified statements hereinabove mentioned, and which amounted to two per cent (2%) of the gross receipts from the operations hereinabove described, was approximately $291,000.00.

2. That in connection with the making and delivery of said statements and the making of the payments that accompanied them, and/or by said statements and said payments, no representation was made by the defendant or the Home Telephone and Telegraph Company except as hereinabove in this paragraph recited.

XXVa

That at all times mentioned in these findings, the defendant and its predecessors in interest have had access to the facts therein recited and to all facts involved in their respective relations to and transactions with the plaintiff equal to the access of the plaintiff; and that at all such times the defendant and its respective predecessors in interest have been as familiar with the facts involved in their respective relations to and dealings with the plaintiff as the plaintiff. That at all times when the defendant and/or its respective predecessors in interest claimed or asserted rights by virtue of Section 536 of the Civil Code of California, each of the corporations when it thus claimed or asserted such rights sincerely believed in the validity of said Section 536 of the Civil Code, and sincerely believed that it was entitled to the rights which it claimed or asserted by virtue of said section; and in entertaining those beliefs, each of said corporations relied on its own judgment and on its own private counsels, and relied also on the conduct of the plaintiff as herein in these findings recited, which conduct confirmed, supported and encouraged each of said corporations in said beliefs, and lulled said corporations respectively into a sense of security and confidence in their reliance on the validity of said Section 536 of the Civil Code.

XXVb

That no action has ever been taken by plaintiff or its Board of Supervisors rescinding, setting aside or otherwise

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modifying or nullifying Ordinance No. 70 (New Series) or the franchise described in said ordinance or to show or indicate that said ordinance or the franchise granted by said ordinance was not considered by plaintiff to be in force and effect; and insofar as shown by the records of said county, said ordinance still is in force and effect.

XXVI

Defendant intends to continue to use and occupy the public streets, alleys and highways of and within plaintiff county and elsewhere in the State of California for its telephone lines and lines of telegraph and to construct, erect, operate and maintain therein and thereupon its conduits, poles, wires and other appurtenances and fixtures of its said lines, all in the manner hereinbefore found and described, without having or procuring from the plaintiff county a franchise so to do.

It is not true that the plaintiff county is or has been, or that any of the inhabitants thereof are or have ever been, or that any part of the community thereof or of any community therein is now or has ever been, or that either or any of said parties are now being or will hereafter be damaged or injured, or threatened with damages or injury in any manner or to any extent or degree whatsoever by such use or occupancy of said streets, alleys and public highways or any thereof, or by the continuance of such use and occupancy by defendant.

XXVII

Neither defendant's said telephone lines or lines of telegraph nor any of the poles, posts, piers or abutments for supporting the insulators, wires or other fixtures of said lines do now, nor have they or either thereof at any time, or in any manner, or at any point, or at all, incommoded or threatened to incommode the public use of either or any of the public roads or highways, or interrupted or threatened to interrupt the navigation of any of the waters in said county;

Neither defendant's said telephone lines or lines of telegraph, nor any of the poles, posts, piers or abutments

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for supporting the insulators, wires or other fixtures of said lines are now, nor have they or either thereof at any time or in any manner or at any point or at all, been, nor do they or either thereof threaten to become, offensive to the senses, or an obstruction of the free use of property, or indecent or offensive to the senses so as to interfere with the comfortable enjoyment of life or property, nor do they or either thereof now obstruct or threaten to obstruct, nor have they or either thereof at any time or at all threatened to obstruct the free passage or use in the customary manner of any navigable lake or river, bay, stream, canal, or basin, or any public park, square, street or highway.

XXVIII

At all times since it started to do business as hereinbefore found, the defendant has received and now receives moneys from the operation (but not from the construction, erection or maintenance) of its said telegraph and telephone system. No evidence of the amount of such moneys has been offered herein. The defendant has refused and now refuses to account or report to the plaintiff county the amount of such moneys or any part thereof except as hereinbefore in these findings stated. Defendant has refused and now refuses to pay to the plaintiff any part of the moneys so received by defendant, except as to payments made during the time ending December 3, 1935, as hereinbefore stated in these findings. Plaintiff is ignorant of the amount of said moneys so received by the defendant. There is and has been no collusion between the plaintiff and the defendant.

XXIX

On or about the 2nd day of December, 1936, the Board of Supervisors of the plaintiff county, duly assembled in meeting, passed and adopted a resolution instructing and authorizing the County Counsel of said county to institute suit against the defendant to recover from the defendant an accounting as to and payment of two per cent (2%) of the gross annual receipts of the defendant arising from its construction, operation and maintenance of its telephone system and the conduits, poles, wires and other appurte-

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nances employed in conjunction therewith under, over, upon and along the streets, alleys and public highways of said county outside of the areas and the time covered by said Ordinance No. 70 (N. S.) and said Ordinance No 129 (N. S.) during the two years immediately prior to the passage and adoption of said resolution; and to procure an injunction permanently enjoining and restraining the defendant from constructing, maintaining or operating said telephone system and said conduits, poles, wires including said telephone lines and lines of telegraph and other appurtenances employed in connection therewith under, over, upon and along the streets, alleys and public highways of said county outside of the area covered by said Ordinance No. 70 (N. S.) unless and until the defendant shall have procured, in the manner prescribed by law, a franchise by the defendant county so to do, and to recover the costs of suit and such other and further relief as the court may allow.

Conclusions of Law

From the foregoing Findings of Fact the Court finds as Conclusions of Law as follows:

I

1. That at all times between the year 1889 and January 8, 1917, Sunset accepted, owned and exercised the valid franchise tendered and offered to it by Section 536 of the Civil Code to construct, maintain and operate its telegraph lines along and upon the public roads and highways and along and across the waters or lands within the State of California, and to erect poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines;

2. That at all times between and including the 19th day of May, 1905, and said 8th day of January, 1917, Sunset accepted, owned and exercised the valid franchise tendered and offered to it by Section 536 of said Civil Code to construct, maintain and operate, and it did, pursuant to said franchise, lawfully construct, maintain and operate its lines of telegraph and telephone lines along and upon the

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public roads and highways and along and across the waters and lands within and throughout said state and within and throughout the county of Los Angeles, and erect poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines;

3. That continuously from the year 1889 until on and after the 19th day of May, 1905, Sunset was lawfully constructing, maintaining and operating its lines of telegraph along and upon the public roads and highways and along and across the waters and lands within and throughout the state of California and within and throughout the county of Los Angeles, and was lawfully erecting poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines under and pursuant to said valid franchise;

4. That from and after said 19th day of May, 1905, Sunset continued to lawfully construct, maintain and operate its lines of telegraph and its telephone lines along and upon said public roads and highways and along and across said lands and waters and to erect poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines under and pursuant to said valid franchise.

II

1. That continuously since and including the 2nd day of January, 1907, Pacific accepted, owned and exercised and still continues to accept, own and exercise the valid franchise tendered and offered to it by said Section 536 of said Civil Code to construct, maintain and operate its telephone lines and lines of telegraph along and upon the public roads and highways and along and across the waters and lands within and throughout the State of California, and within and throughout the County of Los Angeles, and to erect poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of said lines;

2. That under and pursuant to said franchise so accepted and owned by it as aforesaid, Pacific has at all

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times since and including said 2nd day of January, 1907, lawfully occupied and used and continued to lawfully occupy and use the public roads and highways and the lands and waters of said state, including (until the 31st day of May, 1930) the public roads and highways and the lands and waters throughout said County of Los Angeles for its telephone lines and lines of telegraph and the poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures for said lines.

III

1. That continuously from and including the 19th day of May, 1905, Home of Los Angeles, USLD, Pasadena Home, Consolidated and each of said corporations, until and including the conveyances by each of said corporations to defendant as set forth in said findings, accepted, owned and exercised the valid franchise tendered and offered to each of said corporations respectively by Section 536 of the Civil Code to construct, maintain and operate telephone lines along and upon the public roads and highways and along and across any of the waters or lands within said state, and to erect poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures in said lines in such a manner and at such points as not to incommode the public use of any such highway or to interrupt the navigation of any such waters;

2. That Compton Home accepted, owned and exercised said right and franchise tendered and offered to it by Section 536 of said Civil Code continuously from and including the 19th day of May, 1905, until the conveyance by said Compton Home to Consolidated, as set forth in said findings; and said Consolidated accepted, owned and exercised said franchise until the conveyance by Consolidated to defendant as set forth in said findings;

3. That said San Fernando Home accepted, owned and exercised said right and franchise tendered and offered to it by Section 536 of said Civil Code continuously from and including said 19th day of May, 1905, until the conveyance by it to Pacific as set forth in said findings;

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4. That each of said above named corporations during said respective times lawfully used and occupied and continued to lawfully use and occupy said public roads and highways and said lands and waters for its said respective telephone lines in and throughout the incorporated and unincorporated areas of the County of Los Angeles as set forth in said Findings under and pursuant to said valid franchise.

IV

1. That by the leases of January 2nd and October 17, 1907, and the conveyance of January 8, 1917, from Sunset to Pacific referred to in said Findings, the latter corporation succeeded to and became the owner of and thenceforward continued to lawfully exercise all of the rights of Sunset under and pursuant to said franchise granted by the State of California to said Sunset;

2. That by said conveyance of October 1st, 1918, from said San Fernando Home to Pacific, the latter succeeded to and became the owner of and thenceforward lawfully exercised all of the rights of said San Fernando Home under and pursuant to said franchise granted by said State of California to said San Fernando Home;

3. That by said respective conveyances of April 30, 1917, from Pacific and Home of Los Angeles to defendant, the latter succeeded to and became the owner of and thenceforward continued to lawfully exercise all of the rights of said Pacific and Home of Los Angeles, respectively, under and pursuant to said franchises so granted to said Pacific and to said Home of Los Angeles by said State of California as aforesaid, in and throughout the areas described and set forth in said respective conveyances;

4. That by said conveyances of May 31, 1930, from said Pacific, USLD, Pasadena Home, and Consolidated to defendant the latter succeeded to and became the owner of and continuously thenceforward has lawfully exercised and still continues to exercise all of the rights of said four last named corporations, and each of them, under and pursuant to said respective franchises granted to said respec-

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tive four last named corporations by said State of California as aforesaid;

5. That defendant is now and at all times since the 30th day of April, 1917, has been the owner of and has lawfully exercised and is now lawfully exercising the right and franchise lawfully granted by the State of California to it, to construct, maintain and operate its telephone lines and lines of telegraph along and upon the public roads and highways and along and across any of the waters or lands within and throughout the State of California, including said County of Los Angeles, and to erect poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines.

V

That defendant's telephone lines and lines of telegraph are now and at all times since the 30th day of April, 1917, have been lawfully along and upon the public roads and highways and along and across the waters and lands within said County of Los Angeles under and pursuant to said valid franchise.

VI

None of the telephone lines or lines of telegraph of said defendant nor any of the poles, posts, piers or abutments for supporting the insulators, wires or other fixtures of said lines is or ever has been or has at any time threatened nor do they or either of them threaten to be or become a public nuisance, or any nuisance whatever.

VII

That at the time of the commencement of this action and for many years prior thereto it was and still is the rule under the statutes of the State of California, and under the decisions of the courts of said state that Section 536 of the Civil Code extended and offered and extends and offers a valid grant of the right, privilege, authority and franchise described therein to any telegraph or telephone corporation accepting the same, and that the acceptance

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of such grant by a telegraph or telephone corporation by the construction of telephone lines or lines of telegraph along and upon the public roads or highways of said state, and the rendition of telephone and telegraph service to the public by means of such lines, creates a vested right in such accepting telegraph or telephone corporation in and to such right, privilege, authority or franchise; that said rule now constitutes and for many years has constituted, a rule of property, and said rule of property was, at the time of the commencement of this action, and for many years prior thereto had been in full force and effect; that under said rule of property defendant acquired and owns and has the right, privilege, authority and franchise and has at all times since the 30th day of April, 1917, had the right, privilege, authority and franchise to construct, maintain and operate telephone lines and lines of telegraph along and upon the public roads and highways of said state and of the incorporated and unincorporated areas of the County of Los Angeles, and to erect poles, posts, piers and abutments for supporting the insulators, wires and other fixtures of the lines in such manner and at such points as not to incommode the public use of said roads or highways.

VIII

That plaintiff is estopped to deny or question the right, privilege, authority and franchise of defendant to construct, maintain and operate its telephone lines and lines of telegraph along and upon the public roads and highways and along and across the lands and waters in said county, and to erect poles, posts, piers and abutments for supporting the insulators, wires and other fixtures of its said lines in such manner and at such points as not to incommode the public use of such roads or highways or interrupt the navigation of any such waters.

That plaintiff county is estopped as against defendant to maintain, or assert that Section 536 of the Civil Code or any part or provision thereof violates or contravenes any part or provision of the Constitution of the State of California.

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IX

That neither said Sunset nor said Pacific nor said USLD nor said Home of Los Angeles nor said Pasadena Home nor said San Fernando Home nor said Compton Home nor said Consolidated Utilities nor said defendant waived, abandoned or surrendered said franchise offered and tendered by the State of California to telephone and telegraph corporations by said Section 536 of said Civil Code, and owned by each of said corporations as aforesaid.

X

That said franchise so tendered and offered to telephone and telegraph corporations by said Section 536 of the Civil Code as aforesaid, and accepted and owned respectively as aforesaid by said Sunset, and by said Pacific, and by said USLD, and by said Home of Los Angeles, and by said Pasadena Home, and by said San Fernando Home, and by said Compton Home, and by said Consolidated Utilities and by defendant as set forth in said Findings constituted and constitutes, and at all times from the respective dates of the commencement of the construction and operation of telephone and/or telegraph lines by said respective corporations, has constituted, a contract by and with the State of California, with each of said corporations, secured by the Constitution of the United States against impairment by any state, county or other law or regulation;

That under and by said contract said State, in consideration of each of said telephone and telegraph corporations constructing, maintaining and operating its telephone and/or telegraph lines as authorized by said Section 536 of said Civil Code, and rendering to the public telephone and telegraph services by means thereof, granted to, and each of said telephone and telegraph corporations became the owner of, the right, privilege and franchise to construct, maintain and operate, and to continue to construct, maintain and operate, its telephone lines and lines of telegraph along and upon the public roads and highways and along and across the lands and waters of said state and to erect poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of said lines in such manner and at such points as not to incommode the

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public use of said roads or highways or to interfere with the navigation of said waters;

That defendant, in its own right and as successor in interest to said Sunset, Pacific, USLD, Home of Los Angeles, Pasadena Home, San Fernando Home, Compton Home and Consolidated Utilities, as in said Findings set forth, was, at the time of the commencement of this action and for many years prior thereto had been, and still continues to be the owner of and exercising said right, privilege and franchise.

XI

That the alleged cause of action set forth in said complaint is barred by laches of plaintiff in the premises,

XII

That plaintiff is entitled to take nothing by this action.

XIII

That defendant is entitled to judgment herein.

Dated December 18, 1944.

William J. Palmer, Judge.

(Endorsed): No. 410067. Findings of Fact and Conclusions of Law. Filed Dec. 18, 1944. J. F. Moroney, County Clerk. By W. L. Goff, Deputy.

APPENDIX "D"

Civ. No. 14915

County of Los Angeles, Appellant,

vs.

Southern California Telephone Company, a Corporation, Respondent

This is an action in equity by which the county seeks an adjudication that the telephone company must procure a franchise from the county in order to make use of the highways for the operation of its system in unincorporated

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areas of the county. The action seeks, for the past, an accounting for the usable value of the defendant's alleged unauthorized occupancy of such highways, and for the future, an injunction to restrain the telephone company from occupying the highways unless it procures a county franchise. The complaint denominates the defendant's occupancy of county highways as "obstructing the free passage and use in the customary manner by the plaintiff," etc., and as constituting "a public and common nuisance injuriously affecting the property of the plaintiff," etc.

The answer denies obstruction and nuisance, and alleges that the defendant and its predecessors have continuously maintained telephone and telegraph lines throughout the eight southernmost counties since 1889, making use of the highways in connection therewith by virtue of the express provisions of section 536 of the Civil Code. Estoppel and laches are also pleaded by alleging facts showing recognition by the appellant county of the telephone company's rights, over a long period of years. At the trial appellant's attorney renounced any "intention of proving or attempting to prove that . . . the structures are so located that they constitute a nuisance in fact," basing the county's claim upon the theory that the respondent's use of the highways for its poles, wires, etc., was unauthorized.

The primary question, according to appellant's brief, relates to the constitutionality of section 536 of the Civil Code. In addition to maintaining that this section is valid and constitutes a state franchise authorizing use of the highways, respondent contends that with the appellant's renunciation of the nuisance theory adopted in its complaint, no judicial controversy remained. Respondent further asserts that this suit in equity cannot be converted into a quo warranto proceeding and that appellant is not authorized to maintain such a proceeding. It is the respondent's position that by section 536 "the State has left nothing to be granted by a county in respect to franchises to corporations for telegraph and telephone purposes."

Section 536 of the Civil Code, as amended to 1905, reads as follows:

"Telegraph or telephone corporations may construct lines of telegraph, or telephone lines along and upon any

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public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

The section as originally placed in the Civil Code in 1872, applied only to telegraph corporations. It is conceded by the appellants that if section 536 grants a valid franchise, the respondent company has done those things necessary to the procurement of such franchise. During the trial the court rendered an opinion upholding the constitutionality of this section; thereafter evidence was introduced, and the present appeal is from a judgment in favor of the telephone company.

The appellant county maintains that section 536 is invalid in that it amounted to a legislative "grant" of a valuable franchise "without any consideration whatsoever except the operation of a private enterprise for private profit . . . in violation of sections 22 and 31 of Article IV of the State Constitution. It follows that the purported 'grant' was a nullity, that the Telephone Company has had no 'franchise' and that it needs a franchise from the County under the Broughton Act."

Section 22 of article IV of the Constitution of 1879 provided that "no money shall ever be appropriated or drawn from the state treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the state as a state institution, *nor shall any grant or donation of property ever be made thereto by the state;* . . ." (Italics added.)

Section 31 of article IV of the Constitution makes the further limitation that the Legislature shall have no "power to make any *gift or authorize the making of any gift,* of any public money *or thing of value* to any individual, municipal or other corporation whatever; . . ." (Italics added.)

The respondent asserts that the above constitutional provisions were not intended to "forbid the lending of the use of the public highways for and in consideration of the establishment of a public service," and that the decisions

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of this state over a period of more than forty years, have clearly recognized the validity of section 536 of the Civil Code granting telephone and telegraph corporations the use of all public highways. In reference to these California decisions it is the appellant's contention that "nowhere in the opinion of any one of those cases did the Court before which the case was pending pass upon the constitutionality of section 536 in the light of sections 22 and 31 of Article IV of our State Constitution . . . The validity of section 536 . . . was apparently conceded by every party and assumed by the Court."

Among other cases cited by respondent is *Western Union Telegraph Co.* v. *Hopkins*, 160 Cal. 106, 118, where the court said: "In the light of what we have said, it appears that the case of *Western Union Tel. Co.* v. *Visalia*, 149 Cal. 744, does necessarily decide that section 536 of the Civil Code was effectual to grant this right as to all highways lying outside of municipalities, . . . Section 536 . . . has, however, never been confined in terms to highways outside of municipalities, but always purported to apply to all public highways in the state." And on page 119 it is said: "It is earnestly urged . . . that section 536 of the Civil Code is either unconstitutional or cannot be construed as it was in the Visalia case, . . . Assuming that section 536 of the Civil Code was a grant of the right to such use of the streets, we are of the opinion that it must be held, to use the language of the United States circuit court of appeals in *Sunset Tel. & Tel. Co.* v. *Pomona*, 172 F. 837, that the maintenance and operation of such system 'was an acceptance by it of the provisions of that statute, which thereby became a contract between the company and the state, secured by the constitution of the United States against impairment by any subsequent legislation.'"

Although this and other cases hold that the right conferred by section 536 is a "vested" one, it should be noted that this is not an *unqualified* right; the county still has control over the manner of its exercise. Said the court in the *Western Union Telegraph Co.* v. *Hopkins* case at page 121: "Of course, the liability of plaintiff to all such reasonable regulations as is warranted in the proper exercise of the police power cannot be disputed. In fact this is ex-

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pressly stipulated by the provisions in section 536 of the Civil Code, that the system of the telegraph company must be constructed 'in such manner and at such points as not to incommode the public use of the road or highway.' "

The franchise to use the public highways, granted by section 536, has been held taxable for state and county purposes in the county of Los Angeles. (*Western Union Tel. Co.* v. *Hopkins,* 160 Cal. 106; *Western Union Tel. Co.* v. *County of Los Angeles,* 160 Cal. 124; *Postal Tel.-Cable Co.* v. *County of Los Angeles,* 160 Cal. 129; see, also, *Postal Tel.-Cable Co.* v. *City of Los Angeles,* 164 Cal. 156.

The case of *City of Beverly Hills* v. *City of Los Angeles,* 175 Cal. 311, has been particularly commented upon by both parties. Prior to the incorporation of Beverly Hills, the city of Los Angeles had acquired the right to construct a water pipe-line along public roads subsequently included in the city limits of Beverly Hills, by accepting the grant made by the Act of April 11, 1911 (Stats. 1911, p. 852; Deering's Gen. Laws, Act 5194) of the right to so use roads situated in unincorporated territory. At page 315 of the Beverly Hills case, the court says: "*No doubt exists as to the power of the state to make the grant,* which, when accepted as we have seen, constituted an inviolable contract the extent of which is measured by the purpose for which it was intended, and in the exercise of which right defendant was limited alone by the language used in the grant." (Italics added.) See, also, *State* v. *Marin M. Water District,* 17 Cal. 2d 699.

Appellant's contention that the telephone company is obliged to obtain a county charter under the provisions of the Broughton Act, warrants consideration of the case of *County of Inyo* v. *Hess,* 53 Cal. App. 415, 424, where the court says: "Our conclusions are . . . third, that under and by virtue of the provisions of section 536 of the Civil Code, telephone corporations are granted the right and privilege to use the public highways over which to construct and operate lines of telephone wires, free from any grant made by subordinate legislative bodies, and *unrestricted by the provisions of the Broughton Act,* . . . ." (Italics added.) A petition for hearing in the Supreme Court, was denied.

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Section 536 also received consideration in *Postal Tel.-Cable Co.* v. *Railroad Commission*, 200 Cal. 463, 472, where the court held that "This section constitutes a grant of a franchise which the state offered, and petitioner accepted by the construction of its lines. The rights acquired . . . are vested rights which the constitutions, both state and federal, protect. They cannot be taken away by the state, even though the legislature should repeal the section, or by the people through a constitutional provision." The Railroad Commission could not, therefore, demand a certificate of public convenience and necessity from petitioner before it could carry on its intrastate business.

In a recent case not cited by either party thereto,—*City of Salinas* v. *Pacific Tel. & Tel. Co.* (January, 1946) 72 A.C.A. 652, 655, the court again adhered to the views expressed in earlier California cases and said: "The purpose of the 1905 change was to add *telephone lines* and *telephone corporations* to the section (Civ. Code § 536). . . . The section has been construed as a continuing offer by the state to all telegraph and telephone companies to use without compensation such public highways as may be convenient or necessary for the operation of their lines (*Postal-Telegraph Cable Co.* v. *Los Angeles*, 164 Cal. 156)."

A survey of the cases previously mentioned and others cited by appellant and respondent clearly indicates that, as stated by the trial judge in the instant case, "the Supreme Court of California, consistently whenever opportunity has presented itself, has dealt with section 536 of the Civil Code as a valid, constitutional enactment." And, in the language of respondent's brief,—"Appellant not only asks the court to turn its back upon these settled doctrines, but to reverse a series of its own decisions covering more than forty years. . . . Therein statutes have been recognized and acted upon as valid and Constitutional and thereunder untold millions have been expended in the establishment and maintenance of indispensable public services."

In *Miller & Lux* v. *Enterprise Canal & Land Co.*, 142 Cal. 208, 215, answering an assault upon the constitutionality of a code provision, the court said: "And although the point of the unconstitutionality of the section may not heretofore have been expressly raised and decided, still we think the

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principle of the rule of *stare decisis* should apply, ..." The court held that the power there in question "has been continuously recognized and declared by this court for too long a period of time to be now questioned." There is similar expression by Justice Brewer in voicing a concurring opinion in *Western Union Tel. Co.* v. *Pennsylvania R. R. Co.*, 195 U. S. 540, 593: "When this court has construed a statute . . . and that construction has remained for more than a quarter of a century, neither changed by any judicial decisions or set aside by any Congressional legislation, it ought not to be disturbed except for the most cogent reasons."

Since acceptance by the telephone company of the provisions of section 536 of the Civil Code, has been held to effect a contractual relation between company and state (*Western Union Tel. Co.* v. *Hopkins*, 160 Cal. 106, and other cases previously cited), the familiar principle, often announced, and stated again recently in *Hill* v. *Fowble*, 65 Cal. App. 2d 25, 30, may be noticed; namely that "The practical construction placed on a contract by the parties, by their conduct and actions in executing it, is often considered strong evidence of what was intended by its provisions." The trial court in the instant case correctly held that "This principle applies with extraordinary force and appropriateness to Section 536, Civil Code, in respect to which, since the adoption of the Constitution, and until the preliminaries of filing of the instant suit, the practical construction adopted by the state in all departments called upon to construe the section and its relationship to the Constitution has been uniform, and consistent with the validity of the section." Not only this, but the appellant county has apparently acquiesced in this view by way of its answers filed in the Western Union cases hereinbefore mentioned, and otherwise. Respondent further calls attention to the fact, not denied in appellant's brief, that "As late as 1935 efforts of appellant to have it (Section 536) repealed were turned down by the legislature." These matters, it should be noted, are not referred to as bearing upon estoppel or laches alleged by appellant to bar consideration of the constitutional question, the decision of which question is not deemed necessary herein. They are merely mentioned in reference

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to the practical construction of section 536 over a period of many years, as shown by the acts of the parties in connection therewith. While not controlling in reference to the present controversy, such construction is not without value.

Although it is doubtless true, as urged in appellant's brief, that a decision upholding the validity of a statute does not preclude the same court from later declaring the statute unconstitutional upon grounds other than those urged in the first case, such doctrine standing alone cannot support appellant's present contention. Indeed, no pertinent case has been cited which would justify this court in declaring section 536 invalid. On the contrary, what authority there is, fully supports the finding of the trial court. As said in *Lacy* v. *Gunn*, 144 Cal. 511, 514, "the question would seem to be foreclosed by the previous decisions of this court *recognizing the validity, . . . While its constitutionality has not been discussed, section 1 of the act has been treated as valid* and its provisions enforced by the court. . . . These decisions have been generally considered and acted upon as judicial recognitions of the validity of the section, ..." (Italics added.)

In view of the opinion expressed herein, and of the appellant's frank concession that "it has no case at all if section 536 is constitutional," there is no need to consider the other issues in the case.

The judgment is affirmed.

DORAN, J.

I concur.
YORK, P. J.
WHITE, J.

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MARCH 14, 1949.

Per Curiam Decisions.

No. 514. COUNTY OF LOS ANGELES *v.* SOUTHERN CALIFORNIA TELEPHONE CO. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Harold W. Kennedy* for appellant. *Oscar Lawler* and *Francis N. Marshall* for appellee. Reported below: See 62 Cal. 2d 378, 196 P. 2d 773.

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